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In The

Supreme Court of the United States

October Term, 1966

No. 659

STATE OF WISCONSIN,

Petitioner,

v.

MILWAUKEE BRAVES, INC., ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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v.

MILWAUKEE BRAVES, INC., ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

The Attorney General of Wisconsin, on behalf of the State of Wisconsin, petitions for a writ of certiorari to review the judgment of the Supreme Court of Wisconsin in the above-entitled case.[1]

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[1] Respondents are the National League of Professional Baseball Clubs, Chicago National League Ball Club, Inc., Cincinnati Reds, Inc., Los Angeles Dodgers, Inc., Houston Sports Association, Inc., Metropolitan Baseball Club, Inc., Philadelphia National League Club, Pittsburgh Athletic Company, Inc., National Exhibition Company, Milwaukee Braves, Inc., and St. Louis National Baseball Club, Inc.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Wisconsin on removal (R. 2116; App. 269d)[2] is not officially reported. It is unofficially reported at 1965 CCH Trade Cases ¶ 71,597. The memorandum opinions of the Wisconsin Circuit Court (R. 2151, 2195; App. 204c and 54b) are not officially reported. They are unofficially reported at 1966 CCH Trade Cases ¶ 71,666 and ¶ 71,738. The opinion of the Supreme Court of Wisconsin (R. 9467; App. 2a) is officially reported at 31 Wis. 2d 699 and is unofficially reported at 144 N.W.2d 1 and 1966 CCH Trade Cases ¶ 71,843.

JURISDICTION

The judgment of the Supreme Court of Wisconsin (R. 9466; App. 281f) was entered on July 27, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

The Supreme Court of Wisconsin concluded from the facts as found by the Circuit Court that respondents' refusal to deal with qualified applicants for a franchise to continue major league baseball in Milwaukee was an unlawful boycott and an act of monopolization which would violate the Wisconsin antitrust law if that law could be applied. It held, however, that enforcement of the Wisconsin law was barred on federal constitutional grounds. The questions presented are:

1. Whether non-coverage of a business by the federal antitrust laws constitutionally pre-empts state antitrust law when this Court has held that coverage of a

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[2] References to "R. ——" are to the certified record. References to "App. ——" are to the separate Appendix to this petition. References to "Ex. ——" are to exhibits filed with the Circuit Court, which are part of the record in the court below, and in this Court.

business by the federal antitrust laws does not pre-empt state antitrust law.

2. Whether this Court's decisions in *Federal Baseball Club* v. *National League*, 259 U.S. 200 (1922), and *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953), holding that the federal antitrust laws do not apply to organized baseball, and the subsequent inaction of Congress, evidence a "national policy" which constitutionally bars application of state antitrust laws to organized baseball.

3. Whether the Commerce Clause bars application of a state's antitrust law to a business with interstate aspects because of the mere possibility of future conflict with the laws of other states.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statute involved are the Commerce and Supremacy Clauses of the United States Constitution, and §§ 133.01, 133.02, Wisconsin Statutes.

Commerce Clause, U.S. Const., art. I, sec. 8, clause 3:

> "The Congress shall have Power
>
> * * *
>
> To regulate Commerce . . . among the several States . . . ."

Supremacy Clause, U.S. Const., art. VI, clause 3:

> "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . ."

Section 133.01, Wis. Stat. (1965):

> "133.01 UNLAWFUL CONTRACTS; CONSPIRACIES. (1) Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is

hereby declared illegal. Every combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, to be produced or sold therein or constituting a subject of trade or commerce therein, or which combination, conspiracy, trust, pool, agreement or contract shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this state, or fix any standard or figure in which its price to the public shall be in any manner controlled or established, is hereby declared an illegal restraint of trade. Every person, corporation, copartnership, trustee or association who shall either as principal or agent become a party to any contract, combination, conspiracy, trust, pool or agreement herein declared unlawful or declared to be in restraint of trade, or who shall combine or conspire with any other person, corporation, copartnership, association or trustee to monopolize or attempt to monopolize any part of the trade or commerce in this state shall forfeit for each such offense not less than $100 nor more than $5,000 . . . ."

Section 133.02, Wis. Stat. (1965):

"133.02 INJUNCTION; PLEADING; PRACTICE. The several circuit courts may prevent or restrain, by injunction or otherwise, the formation of any such contract or combination or the execution of the purposes thereof. The several district attorneys shall, upon the advice of the attorney general, who may appear as counsel in any such case, institute such actions or proceedings by complaint or information as in ordinary actions and a private party by complaint may institute actions or proceedings as shall be deemed necessary to prevent or restrain a violation of s. 133.01, setting forth the cause and grounds for the intervention of the court and praying that such violation, whether intended or continuing, shall be enjoined or otherwise prohibited. When the parties informed against or complained of have been served with a copy of the information or complaint and cited to answer the same the court shall

proceed, as soon as may be in accordance with its rules, to the hearing and determination of the case; and pending the filing of the answer to such information or complaint may, at any time, upon proper notice, make such temporary restraining order or prohibition as is just . . . ."

STATEMENT

The Circuit Court of Milwaukee County found that the respondents' refusal to deal with qualified applicants for a franchise to continue major league baseball in Milwaukee was an unlawful boycott and an act of monopolization in violation of Wisconsin's antitrust law. (R. 2466-67; App. 199b-200b). The Supreme Court of Wisconsin, in a 4 to 3 decision, reversed the Circuit Court solely on the ground that the Commerce and Supremacy Clauses of the United States Constitution precluded application of Wisconsin's law. (R. 9467; App. 2a).

The State's action was commenced in the Circuit Court on August 6, 1965, against Milwaukee Braves, Inc. (the "Braves") and the nine other corporations comprising the National League of Professional Baseball Clubs (the "National League") and the League itself. (R. 2). Respondents removed the case to the United States District Court for the Eastern District of Wisconsin on August 26, 1965, and in their removal petition, first raised the constitutional questions decided by the court below. They asserted (R. 58):

> "The United States has adopted a national policy, binding upon the several States, that the conduct or exhibition of baseball games and incidents thereto by the defendants is not trade or commerce, and that the practices of the defendants sought to be placed in issue by the complaint herein are lawful. It is beyond the constitutional power of the State of Wisconsin to declare otherwise, or to enact or to enforce any law, or to interfere with, or to impede the rights federally guaranteed to petitioners to conduct as lawful enter-

prises the businesses alleged in the complaint in the said action in the Circuit Court."

On November 9, 1965, the federal district court remanded the case to the Circuit Court (R. 2116; App. 269d) where respondents renewed substantially the same constitutional defenses by demurrers (R. 108, 114), and after the demurrers were overruled (R. 2151; App. 204c), by answer. (R. 120, 131).

On April 13, 1966, the Circuit Court announced its decision. The facts, principally as found by the Circuit Court, are as follows:

Milwaukee is a good baseball market. (R. 2464; App. 198b). The Braves played major league baseball in Milwaukee County Stadium from 1953 to 1965 and drew 19 million fans. The average annual attendance in Milwaukee for the entire 13-year period was second highest of all of the teams in the major leagues. This was 31 percent higher than the average for the National League and 52 percent higher than the average for the American League. (R. 2463-64; App. 197b-198b).[3] Between 1953 and 1965, the Braves' owners realized pre-tax profits and capital gains aggregating approximately 13 million dollars. (R. 2462; App. 196b-197b). The Circuit Court found that "Milwaukee has the ability to reasonably support a Major League Team." (R. 2464; App. 198b).

In the fall of 1962, the Braves' franchise and its player contracts were purchased by a Chicago syndicate.

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[3] The Braves never drew fewer than 1,100,000 until 1962, which was their low year, drawing 766,921. In 1963, attendance rose to 773,018 and in 1964 to 910,911, despite the fact that the Braves were not pennant contenders and the air was filled with rumors of the impending move. (R. 2389-90, 2401, 2464; App. 133b, 143b, 198b). The 1965 attendance of 555,584 reflected the bitterness of the fans over the move to Atlanta, which had been announced in the fall of 1964. (R. 2401, 2411; App. 143b, 152b).

(R. 2462; App. 196b, Ex. 13). The new owners paid over six million dollars for assets which were valued on the former owners' books at $322,000. They immediately began to court offers from other communities to move the franchise. (R. 2377; App. 122b). Informal, but firm arrangements were made to move to Atlanta in the spring of 1964. (R. 2379; App. 124b-125b). The decision of the Braves to move was made in secret and deceitfully denied, thus misleading the consuming public. The dissenting opinion of the Supreme Court of Wisconsin stated in part (R. 9506; App. 52a):

> "The record is rife with evidence that the corporation acted surreptitiously and deceitfully in an effort to prevent a timely exercise of Wisconsin's jurisdiction."

Although the Braves' operation had always been profitable (R. 2462; App. 196b-197b), and remained so in 1963 and 1964 (R. 2463; App. 197b), in October 1964 the Braves formally sought permission from the National League to transfer its franchise to Atlanta, Georgia. (R. 2387; App. 131b). On November 7, 1964, the National League unanimously approved the application to be effective beginning with the 1966 baseball season. (R. 2388; App. 132b). Transfer of the Braves' franchise from Milwaukee made that city the first since 1903 to be wholly abandoned by major league baseball. (R. 4854).

After the move of the Braves to Atlanta had been approved by the National League, the Wisconsin statutes were amended to authorize Milwaukee County (the "County"), which already owned a suitable baseball stadium and related facilities, to own and operate a professional baseball team. (R. 2336; App. 89b). On July 29, 1965, the Milwaukee Brewers Baseball Club, Inc. (the "Brewers") was incorporated for the purpose of owning and operating a major league franchise in Milwaukee. (R. 2335-36; App. 88b-89b). Both the County and the Brewers are well-qualified to own and operate a major league baseball team.

(R. 2419-2421, 2501; App. 159b-161b, 278e). The County on July 22, 1965, and the Brewers on August 12, 1965, made proper franchise applications to the National and American Leagues. (R. 2460; App. 194b). But on December 2, 1965, the National League rejected both applications. (R. 2421; App. 162b). The American League refused to act. (R. 2460; App. 194b).

Expansion of the number of major league franchises to provide one to serve the Milwaukee market is feasible. (R. 2464; App. 198b). The alleged difficulties which respondents said they would suffer from expanding the League from 10 to 11 or more teams, narrowed down to (1) a lack of players (R. 2422; App. 162b), and (2) an inability to prepare a schedule for an odd number of teams. (R. 2428; App. 167b). The Circuit Court concluded from the record testimony of experts, including Commissioner of Baseball, Ford Frick, the Braves' own manager, and William Veeck, a former owner and manager of several of the major league clubs, "that there are sufficient baseball players to stock a team in Milwaukee." (R. 2422; App. 162b). The Circuit Court was satisfied from the sample 11-team schedules offered and explained on the record, that a "practical schedule can be arranged."[4] (R. 2428; App. 167b). It has been the view of Mr. Frick that expansion of the major leagues to 12 teams would be better for baseball than the present 10-team leagues. (R. 2422; App.

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[4] Each of the ten teams presently in the National League plays 162 games during the baseball season. (Ex. 1, p. 22). The teams are located in 8 states. (R. 2450-51; App. 185b-186b). Rather than playing 162 games in a season, each team in an 11-team league could play 160 games in a season which would be one week longer. (Ex. 589). An alternative schedule could be played without reducing the total number of games and without lengthening the regular playing season by using "split" double-headers (home team plays two different opponents on the same day). (Ex. 591). The actual mileage traveled to meet the new schedules would be approximately the same as that traveled under the present scheduling. (Ex. 590).

162b-163b). This alternative is available. The National League could expand to 12 teams. An application was filed for a major league franchise to operate in the Dallas-Fort Worth area, the largest unserved baseball market in the country.[5] (Milwaukee is the second largest.) (R. 2421, 2405; App. 162b, 146b).

New members can enter this industry only at the sufferance of the existing members. Without a franchise from the National or American Leagues neither the County nor the Brewers can, as a practical matter, organize a major league club. (R. 2458-59; App. 192b-193b). The reason is that organized baseball has a monopoly of player services (R. 2326, 2332, 2466; App. 80b, 86b, 199b), maintained through the use of the so-called "reserve clause,"[6] which bars players for life from employment by teams

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[5] A baseball market is considered to consist of an area within a 50-mile radius of the stadium. (R. 2415; App. 156b).

[6] The "reserve clause," which applies to all players in organized baseball (both in the major leagues and in the minor leagues), is a scheme of contractual provisions and rules. The rules permit each major league club, after each season, to "reserve" up to 40 players for the ensuing season (Major League Rule 4-A, Ex. 1, p. 530), and prohibit players, while they are under contract or "reserved," from negotiating for employment with any other club. (Major League Rule 3(g), Ex. 1, p. 513). The Uniform Players Contract (Ex. 5) gives each club the unilateral right to renew each player's contract for the following season and prohibits a player under contract from playing baseball for any other club. The effect of the reserve clause is that each player must play for the club which owns his contract or he will be prevented from playing professional baseball anywhere in the United States. (R. 2328-2332; App. 82b-86b). Minor league players are subject to similar reserve provisions. (Ex. 1, p. 626).

outside organized baseball,[7] and is enforced by blacklisting players who accept such employment. (R. 2458; App. 192b). Furthermore, the major league teams have agreed not to play with non-league teams during the season. (R. 2453; App. 188b).

There was testimony that the scarcity of franchises greatly increases the market value of each existing franchise and each franchise owner's bargaining power. (R. 3399-3402, 3446-47). Respondents' agreement to remove the Braves' franchise from Milwaukee and to prevent Milwaukee applicants from securing an expansion franchise maintains the scarcity of franchises.[8]

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[7] As the then Commissioner of Baseball, Mr. Ford Frick, testified (R. 2331; App. 85b):

> "Q. If that player quits a baseball team, can he play baseball with any other baseball team that is governed by the League Rules or Agreements?
>
> "A. Not governed by the book [agreements governing organized baseball].
>
> "Q. And that would literally eliminate him from what we know in this country as professional baseball, would it not, sir?
>
> "A. In this country, organized baseball. It doesn't prevent him from going to Japan or Venezuela or any other place, playing semi-pro or anything of that sort."

[8] From the evidence before it relating to the limitation of franchises to 16 for over 60 years, the destruction by the major leagues of the fledgling Federal League (R. 3376), the wholesale blacklisting of players after the 1946 Mexican League war (R. 3389) and the destruction in 1960 of Branch Rickey's proposed Continental League by the absorption into the existing major leagues of four continental league cities (R. 2398; App. 140b; Exs. 7, 38), the Circuit Court found as a fact that (R. 2458; App. 192b):

> "25. Over a period of many years, the defendants and the American League and its members have achieved adherence to the Major League Agreement, the Professional Baseball Agreement, and the National Association Agreement of all persons engaged in professional baseball by the use, and threat of use, of practices such as refusing to deal with clubs and

Respondents' unlawful conduct threatened to injure not only the Milwaukee applicants for major league franchises (the Brewers and the County) but also the County in its capacity as owner of the Milwaukee stadium, since it would not be able to secure a suitable substitute tenant (R. 2460; App. 194b), and other commerce in Wisconsin which is dependent upon major league baseball. (R. 2460-61; App. 195b-196b). Expert economist Robert T. Nathan testified that the commercial impact on Milwaukee of respondents' boycott was estimated at 18 million dollars per year.[9] (R. 2343; App. 94b). The trade and commerce involved constitutes not only the exhibition for profit of major league baseball games, but also the broadcasting, televising and reporting thereof. (R. 2461; App. 195b).

From these facts, and using federal precedents as a guide in accordance with Wisconsin practice, the Circuit Court concluded as a matter of law that "the refusal of the National League and the failure of the American League to issue a franchise to Milwaukee County or the Milwaukee Brewers, Inc., was a concerted refusal to deal" illegal under Wisconsin law, whether it be judged as a

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leagues not parties to said agreements and excluding from employment as a player any player who failed or refused to submit to or be bound by the terms of those agreements and rules promulgated pursuant thereto. Since the establishment of the American League, all attempts to organize additional Major Leagues have been prevented by the defendants and the American League and its members."

[9] For example, over the period 1953-65, the Braves paid Milwaukee County $2,800,000 in rent; the County earned $1,600,000 in parking fees; and the Braves' payroll in Milwaukee was $17,600,000. The Braves purchased over $5,500,000 of perishables for resale at baseball games. (R. 2341; App. 92b). The Braves themselves represented to the other respondents (to justify their decision to move) that in the years 1953 to 1963 inclusive, over $50,000,000 out-of-town revenue was brought into the City of Milwaukee by major league baseball. (R. 2341; App. 92b; Ex. 10).

boycott unlawful *per se*,[10] or judged by the rule of reason.[11] It held, moreover, that the refusal to deal constituted an act of monopolization,[12] and a violation of the common law prohibition against a monopoly's unreasonable refusal to deal.[13] (R. 2467; App. 200b).

On May 5, 1966, judgment was entered against the respondents. (R. 2497; App. 275e). It assessed maximum statutory forfeitures of $5,000 against each respondent except the National League and awarded injunctive relief.

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[10] See *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966); *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); *Radiant Burners, Inc.* v. *Peoples Gas Co.*, 364 U.S. 656 (1961); *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959); *Fashion Originators Guild* v. *Federal Trade Commission*, 312 U.S. 457 (1941); *Washington State Bowling Proprietors Assn.* v. *Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir. 1966), certiorari denied, 384 U.S. 963 (1966); *People* v. *Santa Clara Valley Bowling Proprietors' Assn.*, 47 Cal. Rptr. 570 (Dist. Ct. App. 1965).

[11] See *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918); *Gamco, Inc.* v. *Providence Fruit & Produce Bldg.*, 194 F.2d 484 (1st Cir. 1952), certiorari denied, 344 U.S. 817 (1952); *United States* v. *Associated Press*, 52 F.Supp. 362 (S.D.N.Y. 1943), affirmed, 326 U.S 1 (1945)

However, both the Circuit Court and the Wisconsin Supreme Court held that they would not follow this Court's decisions in *Federal Baseball Club* v *National League*, 259 U.S. 200 (1922), and *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953), in interpreting the state statute. (R 2171-80, 9480-81; App 221c-229c, 20a).

[12] See *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *United States* v. *Griffith*, 334 U.S. 100 (1948); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Six Twenty-Nine Prods, Inc.* v. *Rollins Telecasting, Inc.*, 1966 CCH Trade Cases ¶ 71,878 (5th Cir., August 30, 1966); *Packaged Programs, Inc.* v. *Westinghouse Broadcasting Co., Inc.*, 255 F.2d 708 (3d Cir. 1958).

[13] See *Munn* v. *Illinois*, 94 U.S. 113, 131-32 (1876); *Falcone* v. *Middlesex County Medical Soc.*, 34 N.J. 582, 170 A.2d 791 (1961); *Shepard* v. *Milwaukee Gas Light Co.*, 6 Wis. 539 (1858); *Allnutt* v. *Inglis*, 12 East 527, 104 Eng. Rep. 206 (K.B. 1810); compare *United States* v. *Terminal Railroad Assn.*, 224 U.S. 383 (1912).

In framing the decree, the Circuit Court recognized that, even if it had the power, it was not required to invalidate the monopoly's control of players' services and free them to deal directly with Wisconsin applicants. (R. 2448; App. 184b).[14] It enjoined respondents from "refusing to grant the application for membership in the National League submitted by Milwaukee County or Milwaukee Brewers Baseball Club, Inc., or by some other suitable person . . . ." (R. 2501; App. 278e). It further required the respondents to facilitate the organization and operation of a team, and to adopt and execute "an equitable plan for providing a supply of major league professional players for such team."[15] (R. 2501; App. 279e).

The Supreme Court of Wisconsin (the court below), assuming that the Circuit Court's findings of fact were supported by the evidence, reversed and ordered the complaint dismissed. (R. 9466, 9483; App. 24a, 281f). The majority rejected respondents' state-law defenses, and agreed with the Circuit Court that respondents had violated the Wisconsin antitrust law (R. 9477; App. 16a):

> "It seems crystal clear that under today's structure of organized professional baseball, defendants and the members of the American League have complete power to control participation in major league baseball, and to control the number of teams and the location of their home games; that although the power is shared with the American League, defendants nevertheless have very substantial and effective power of control; that major league baseball, as now carried on, is a

[14] See *United States* v. *Terminal Railroad Assn.*, 224 U.S. 383 (1912).

[15] The complaint in this action originally alleged that the removal of the Braves from Milwaukee to Atlanta was wrongful and sought an order preventing the Braves from removing the franchise to Atlanta. (R. 11, 15). While the Circuit Court below awarded an injunction barring the franchise shift as alternative relief (R. 2501-03; App. 279e-280e), the Supreme Court of Wisconsin held that on state law grounds it would not sanction the entry of any such order in this action. (R. 9484; App. 25a).

> business in which large sums are invested, and substantial gains received by players and owners, and that many other business activities are generated by and dependent upon it; that all the continuous interaction which constitutes major league baseball, and which holds the interest and support of the public has for 13 years reached into Wisconsin, but it now operates entirely outside this state; that defendants have, by agreement among themselves to transfer the Braves, *terminated very substantial business activity in Wisconsin, and are totally and effectively preventing its resumption at the present time. On their face, these facts support a conclusion that there is a combination or conspiracy in restraint of trade and commerce, declared illegal by the first sentence of sec. 133.01, Stats., as well as a combination to monopolize trade, under the third sentence of the section.*" [Emphasis supplied.]

The majority also found that it was probable, if not certain, that "the operations of organized baseball are rife with violation of the Sherman Act if it were to be applied . . . ." (R. 9492; App. 36a).

The majority ordered the complaint dismissed irrespective of this monopolization and boycott, solely on the ground that the federal Constitution barred state jurisdiction. The majority opinion stated (R. 9495; App. 39a):

> "A majority of this court (though not in complete agreement as to which of the two theories just stated is controlling), conclude that the Wisconsin antitrust statute cannot, because of requirements of the federal constitution, be applied to concerted action by the defendants in moving the Braves from Milwaukee and refusing applications by others for a franchise."

The two theories relied upon by the majority were that: (1) this Court's decisions in *Federal Baseball Club* v. *National League*, 259 U.S. 200 (1922), and *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953), together with Congressional inaction on the subject, evidenced a "national policy" which constitutionally pre-empted state anti-

trust laws insofar as they applied to organized baseball, and (2) the Commerce Clause barred the antitrust enforcement sought by the State because of the possibility that such enforcement might conflict with that of other states. (R. 9493-95; App. 37a-39a).

The three dissenting justices agreed with the majority that respondents had violated Wisconsin's antitrust law. (R. 9496; App. 40a-41a). But the dissenters reasoned that Wisconsin's antitrust law could be pre-empted only by express federal legislation, and concluded that "the proposition that the majority asserts is a novel one without prior foundation in constitutional law and is an express repudiation of the doctrine that there shall be pre-emption or a superseding of state regulations only by express legislation." (R. 9499; App. 44a). In any event, said the dissent, Congressional silence in the light of *Federal Baseball* and *Toolson* indicated no intention to displace state antitrust law. (R. 9498; App. 43a).

The dissent also concluded that the Commerce Clause was no barrier to the State's action. It noted that respondents had not claimed that Wisconsin's antitrust law was applied in a discriminatory manner. Nor, said the dissent, could the application of state law in this case unduly burden interstate commerce. To the contrary, the dissent reasoned, the Circuit Court's decree cured the violations with minimal burdens upon respondents. It found it "difficult to see what national interest is preserved by immunizing this organization from the consequences of its violation of state law." [16] (R. 9502-06; App. 48a-53a).

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[16] Related actions are now pending in the United States District Court for the Eastern District of Wisconsin. In *Milwaukee Braves, Inc.* v. *Grobschmidt*, No. 65-C-196, plaintiff seeks to enjoin the County of Milwaukee and the Attorney General of Wisconsin from enforcing State or federal antitrust laws against the Braves. In *County of Milwaukee* v. *Milwaukee Braves, Inc., et al.*, No. 65-C-207, Milwaukee County charges the respondents with violation of federal and State antitrust laws.

REASONS FOR GRANTING THE WRIT

Organized baseball was originally held by this Court to have too little involvement in interstate commerce to permit the exercise of federal jurisdiction.[17] *Federal Baseball Club* v. *National League,* 259 U.S. 200 (1922). It achieved this result in part by representing to this Court that state law would protect the public. See pp. 26-7, *infra.* Yet the court below now paradoxically holds that organized baseball has so much involvement in interstate commerce that the State is constitutionally powerless to protect its public from what the court below characterized as the industry's "arbitrary and unfair dealing." (R. 9495; App. 40a). Baseball thus becomes the only non-regulated industry in the United States completely free to disregard both federal and state antitrust laws. So far as we can discover, this Court has never held that, where Congress has not covered an enterprise under the federal antitrust laws, that enterprise becomes immune to state antitrust law as well. This remarkable result in itself requires review by this Court.

Furthermore, the decision of the court below that state law is preempted by Congressional inaction will inevitably frustrate state antitrust enforcement against many other industries engaged in interstate commerce. If a "national policy" barring state antitrust law can be constructed from Congressional failure to regulate organized baseball, a similar "national policy" displacing state law can be constructed wherever Congress may be deemed to have adopted a policy of federal non-regulation, whether by legislation or inaction.

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[17] Petitioner assumes arguendo for the purpose of this petition that the federal antitrust laws are wholly inapplicable to organized baseball. However, petitioner believes that federal law does apply in the circumstances of this case; and, if certiorari is granted, petitioner will argue that the Sherman Act applies and that, for this additional reason and under the authorities cited in footnotes 21-23, *infra,* state law is not pre-empted.

The pre-emption doctrine here is based on a more violent distortion of *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953), and has much more far-reaching and disturbing implications than the decision of the lower court in *Radovich* v. *National Football League*, 352 U.S. 445, 447 (1957), in which this Court granted certiorari "to clarify the application of the *Toolson* doctrine."

The second ground for the decision below is just as dangerous a constitutional precedent as the pre-emption theory. The court below held that the mere possibility of a future conflict with the regulatory laws of other states entitles any business engaged in both intrastate and interstate commerce to violate a state's antitrust law with impunity. No longer is actual conflict required.

The decisions of this Court have encouraged state enforcement and have repeatedly considered and rejected a variety of constitutional defenses asserted by resourceful violators of state antitrust law.[18] The Commerce Clause concept announced by the court below, unless promptly arrested, could become as formidable an obstacle to state antitrust enforcement as the Due Process Clause and the notion of "natural law" were once considered to be.

The question of the power of the states to enforce their own antitrust laws is especially significant at the present

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[18] *Tigner* v. *Texas*, 310 U.S. 141 (1940) (equal protection); *International Harvester Co.* v. *Missouri*, 234 U.S. 199 (1914) (equal protection); *Central Lumber Co.* v. *South Dakota*, 226 U.S. 157 (1912) (equal protection, due process); *German Alliance Ins. Co.* v. *Hale*, 219 U.S. 307 (1911) (equal protection, due process); *Grenada Lumber Co.* v. *Mississippi*, 217 U.S. 433, 441 (1910) (14th amendment); *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909) (equal protection, due process, impairment of contracts); *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86, 107 (1909) (art. 1, sec. 10); *Carroll* v. *Greenwich Ins. Co.*, 199 U.S. 401 (1905) (14th amendment); *National Cotton Oil Co.* v. *Texas*, 197 U.S. 115 (1905) (equal protection, due process); *Smiley* v. *Kansas*, 196 U.S. 447 (1905) (14th amendment).

time because of the increasing importance of such enforcement as a supplement to federal antitrust regulation. Both the United States Department of Justice [19] and the Federal Trade Commission [20] encourage the states to enforce their antitrust laws and to cooperate with the federal government in doing so. The National Commission on Uniform State Laws, the National Association of Attorneys General, and other professional groups are working on a proposed uniform or model state antitrust law. These developments make it particularly appropriate for this Court to reverse a precedent which bars a state's application of its antitrust laws to a business merely because of a possibility of conflict with the laws of other states.

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[19] The Department of Justice recognizes that state enforcement against restraints of trade is "a valuable complement to the federal antitrust program, with benefits to the national competitive climate that are felt beyond state borders." Amicus brief for the United States in *State* v. *Sterling Theatres Co.*, 64 Wash. 2d. 761, 394 P. 2d 226 (1964), p. 11. See also amicus brief for the United States in *State v. Southeast Texas Chapter*, 358 S.W. 2d 711 (Tex. Civ. App. 1962), certiorari denied, 372 U.S. 965, 969 (1963).

[20] See Federal Trade Commission press release dated October 14, 1965, announcing the establishment of the Office of Federal-State Cooperation.

I. IN EXTENDING ORGANIZED BASEBALL'S FEDERAL ANTITRUST EXEMPTION TO PRE-EMPT THE APPLICATION OF STATE ANTITRUST LAWS, THE COURT BELOW HAS MISINTERPRETED THIS COURT'S DECISIONS AND SUBSEQUENT CONGRESSIONAL INACTION AND HAS DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION CONTRARY TO APPLICABLE DECISIONS OF THIS COURT

A. The Court Below Erroneously Held That Application of State Antitrust Laws to an Industry Were Pre-empted by an Exemption of that Industry from the Non-preempting Federal Antitrust Laws.

Until the decision below, it had been considered well-settled by decisions of this Court [21] and of the lower federal and state courts [22] that the Sherman Act [23] and other fed-

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[21] See *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 495 (1949); *Watson* v. *Buck*, 313 U.S. 387, 403-04 (1941); *Straus* v. *American Publishers' Assn.*, 231 U.S. 222 (1913); *Standard Oil Co.* v. *Tennessee*, 217 U.S. 413 (1910). *Cf. Puerto Rico* v. *Shell Co.*, 302 U.S. 253 (1937) (sustaining Puerto Rico antitrust act against claim of pre-emption by Sherman Act.)

[22] See, *e.g.*, *State* v. *Sterling Theaters*, 64 Wash. 2d 761, 394 P.2d 226 (1964); *State* v. *Southeast Texas Chapter*, 358 S.W. 2d 711 (Tex. Civ. App. 1962), certiorari denied, 372 U.S. 965, 969 (1963); *Peoples Savings Bank* v. *Stoddard*, 359 Mich. 297, 102 N.W. 2d 777 (1960); *Alfred M. Lewis, Inc.* v. *Warehousemen Local Union No. 542*, 163 Cal. App. 2d 771, 330 P.2d 53 (1958); *Commonwealth* v. *McHugh*, 326 Mass. 249, 93 N.E. 2d 751 (1950), certiorari denied, 340 U.S. 911 (1951); *Mayer Bros. Poultry Farms* v. *Meltzer*, 274 App. Div. 169, 80 N.Y.S. 2d 874 (1948), appeal denied, 274 App. Div. 877, 83 N.Y.S. 2d 228 (1948); *Speegle* v. *Board of Fire Underwriters*, 29 Cal. 2d 34, 172 P.2d 867 (1946); *Leader Theatre Corp.* v. *Radforce Amusement Corp.*, 186 Misc. 280, 58 N.Y.S. 2d 304 (Sup. Ct. 1945), affirmed, 273 App. Div. 844, 76 N.Y.S. 2d 846 (1948); *Mathews Conveyor Co.* v. *Palmer-Bee Co.*, 135 F.2d 73, 82 (6th Cir. 1943). *Cf. Territory* v. *Long Bell Lumber Co.*, 22 Okla. 890, 99 Pac. 911 (1908); *People* v. *National Research Co.*, 20 Cal. Rptr. 516, 524 (Dist. Ct. App. 1962).

[23] Senator Sherman described the purpose of the Sherman Act, now 15 U.S.C. § 1, *et seq.*, as follows:

> "This bill . . . has for its . . . object to invoke the aid of the courts of the United States to deal with the combinations

eral antitrust laws do not pre-empt or displace state antitrust laws, but create overlapping and concurrent jurisdiction. In particular "[t]hat states have constitutional power to prohibit competing dealers and their aiders and abettors from combining to restrain freedom of trade is beyond question. . . . Agreements and combinations not to sell to or buy goods from particular persons . . . are well recognized trade restraint practices which both state and national legislation can and do prohibit." *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 495 (1949).

Thus, even if Congress were to overrule *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953), and *Federal Baseball Club* v. *National League*, 259 U.S. 200 (1922), and apply the federal antitrust laws to organized baseball, state antitrust law would not be pre-empted from reaching organized baseball. Yet the court below holds that this Court's decisions in *Federal Baseball* and *Toolson*, excluding organized baseball from the coverage of the federal antitrust laws, combined with subsequent Congressional inaction, do pre-empt state antitrust law.

So far as we have discovered, this Court has never held that, where Congress has not covered an enterprise under the federal antitrust laws, that enterprise becomes immune to state antitrust law as well. Nor have we found any authoritative case under any other non-pre-empting federal

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. . . when they affect injuriously our foreign and interstate commerce . . . and in this way to *supplement the enforcement of the established rules of the common and statute law by the courts of the several States* in dealing with combinations that affect injuriously the industrial liberty of the citizens of these States. It is to arm the Federal courts within the limits of their constitutional power that they may *co-operate with the State courts* in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States." [Emphasis supplied]. 21 Cong. Rec. 2457 (1890). See also H.R. Rep. No. 1707 51st Cong., 1st Sess. (1890), p. 1.

regulatory law holding that when Congress decided not to cover an industry, it thereby pre-empted state law.

The holding of the court below conflicts in principle with the decisions of other state courts holding that the Clayton Act's express exemption of labor organization activities from the federal antitrust laws[24] does not exempt these activities from state antitrust laws. See, *e.g.*, *Commonwealth* v. *McHugh*, 326 Mass. 249, 93 N.E. 2d 751 (1950), certiorari denied, 340 U.S. 911 (1951); *Mayer Bros. Poultry Farms* v. *Meltzer*, 274 App. Div. 169, 80 N.Y.S. 2d 874 (1948), appeal denied, 274 App. Div. 877, 83 N.Y.S. 2d 228 (1948).

As the New York Court stated in *Mayer Brothers*, 274 App. Div., at 176, 80 N.Y.S. 2d, at 881:

> "[W]ithdrawal [of the activity from the federal antitrust laws] has left in force the statute and common law of the States upon the same subject, which in many instances antedated the adoption of the Sherman Act, and the power of the State courts to enforce their own law remains, even in cases involving interstate commerce, where the Federal Government has not occupied the entire field . . . ."[25]

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[24] Strictly "whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and §20 of the Clayton Act [which contains the exemption] and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct." *United States* v. *Hutcheson*, 312 U.S. 219, 231 (1941).

[25] In *McHugh* the Massachusetts Supreme Judicial Court similarly stated (326 Mass., at 268, 93 N.E. 2d, at 763-64):

> "This is simply an instance where State law is somewhat more inclusive than the Federal law as now amended. It would seem that in the absence of complete preemption of the field such differences are permissible, and that State law may cover a form of monopoly which the Federal law no longer reaches."

The argument that the Clayton Act labor exemption, 29 U.S.C. § 52, barred state antitrust jurisdiction was unsuccessfully urged as

These state holdings are corroborated by this Court's decisions permitting application of state law to labor union activities exempt by the Clayton Act from the federal antitrust laws. *E.g.*, compare *Carpenters Union* v. *Ritter's Cafe*, 315 U.S. 722 (1942) with *United States v. Hutcheson*, 312 U.S. 219 (1941). See also *Maryland and Virginia Milk Producers Assn., Inc.* v. *United States*, 362 U.S. 458, 464 (1960); *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 496 (1949).

Organized baseball is at best the beneficiary of an implied exemption from the Sherman Act that originated in the theory that it was local in character and has since been preserved as a matter of *stare decisis*. Organized labor, on the other hand, enjoys an express exemption from the Sherman Act to foster its legitimate activities. Under these circumstances, it would indeed be ironic if organized baseball should enjoy an exemption from state antitrust laws not possessed by organized labor.

To a great extent, state antitrust jurisdiction over organized labor is now, of course, pre-empted by the Labor Act, 29 U.S.C. § 141 *et seq.* *Teamsters Union* v. *Oliver*, 358 U.S. 283 (1959); *Weber* v. *Anheuser-Busch, Inc.*, 348

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a reason for certiorari in *McHugh*. See petition for certiorari, No. 359, 1950 Term, pp. 31-32.

See also *American Export Door Corp.* v. *John A. Gauger Co.*, 154 Wash. 514, 524, 283 Pac. 462, 465 (1929) (federal exemption for export trade associations, 15 U.S.C. §§ 62, 63, does not bar application of antitrust provision in State constitution).

There are a number of other federal antitrust exemptions which, under the decision below, could be argued to pre-empt state law. These include: 7 U.S.C. § 291 (agricultural associations), 15 U.S.C. § 521 (fishery associations), 46 U.S.C. § 885 (marine insurance associations), 15 U.S.C. § 636(a)(6) (small business concerns), 15 U.S.C. § 17 (agricultural and horticultural cooperatives).

Of course, non-antitrust federal regulation (particularly through federal regulatory agencies) in the area of federal antitrust exemptions will often pre-empt state law.

U.S. 468 (1955). This is because the Labor Act is a pervasive regulatory scheme that proves a Congressional purpose to occupy the field. It perfectly illustrates the critical distinction between the pre-emptive effect of a Congressional decision to adopt an encompassing regulatory statute and the non-pre-emptive effect of more limited types of federal regulation such as the antitrust laws.

Furthermore, it appears that even in the case of a pervasive federal regulatory scheme such as the Labor Act, an express Congressional decision to exempt a certain class of employees from the Act does not pre-empt state regulation of the federally exempted class. This Court recently held that the Labor Act's exemption of supervisory employees does not pre-empt state laws. *Hanna Mining Co.* v. *Marine Engineers*, 382 U.S. 181 (1965). It found no pre-emption because "Congress made no considered decision generally to exclude state limitations . . . ." 382 U.S., at 190. If the pre-empting Labor Act does not displace state law as to classes of persons not covered by the Act, it is difficult to see how the non-pre-empting Sherman Act can do so. And if an express Congressional exemption from the Labor Act is not the "considered decision" required to pre-empt state law, surely no such "considered decision" can be found in mere Congressional inaction after *Federal Baseball* and *Toolson*.

The court below based its extraordinary concept of pre-emption by non-coverage upon both the Supremacy and Commerce Clauses of the Constitution. The error of reliance upon the Supremacy Clause is apparent on its face. That clause provides that the "Laws of the United States . . . shall be the supreme Law of the Land . . . ." "National policy" is not a Law. At best, this Court has ruled that the antitrust laws passed by Congress do not cover organized baseball; but Congress has passed no law exempting baseball from state antitrust laws, or pre-empting state antitrust laws in any respect whatever, expressly or by reasonable implication.

The lower court's reliance on "national policy" as a basis for pre-emption by operation of the Commerce Clause is equally unsound. The court below did not, in this respect, consider the application of the Commerce Clause of its own force. It erroneously derived its "national policy" by guessing [26] whether Congress by its silence intended to extend this Court's baseball decisions beyond an exclusion from coverage of federal law into a pre-emption of state law. The only Congressional expression of "national policy" pertinent to a pre-emption question under the Commerce Clause is that expressed in Acts of Congress.[27] For example, the "national policy" specifically expressed in the Interstate Commerce Act (54 Stat. 899 (1940))—that there is a vital federal interest in an efficient national rail transportation system—has been invoked to strike down a state law regulating the length of trains. *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 773 (1945). There is no such authoritative Act of Congress expressing any national interest in organized baseball or in its freedom to operate without federal or state antitrust restraints.[28] The only relevant federal statutes are the federal anti-

[26] The court below quotes with approval a commentator's advice that: "The Court has to guess, and in guessing it is likely to conceive that its wisdom coincides with the wisdom of Congress." Ribble, State and National Power Over Commerce (1937), p. 212.

[27] While it is sometimes said that, where there is no relevant legislation, the Court's duty is to determine the presumed intent of Congress where Congress has not spoken, this is merely another way of stating what the Commerce Clause itself requires. See *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 768 (1945). Therefore, the Court's duty in such circumstances under the Commerce Clause is not to determine what Congress *in fact* would have done if it had legislated, but to determine, upon an independent appraisal of the facts, what limitations the Commerce Clause itself imposes. Since the court below purported to give a meaning to Congressional *inaction* beyond that which the Commerce Clause would itself require, its decision erroneously applied that clause.

[28] Of course, 15 U.S.C. § 1291 *et seq.* exempts certain television pooling agreements from the federal antitrust laws.

trust laws themselves. As we have shown, the language and policy of those laws do not pre-empt; they contemplate concurrent federal and state enforcement.

Moreover, even if a "national policy" can properly be discovered in Congressional inaction, Congressional silence here supports, rather than denies, state power over organized baseball. Certainly it falls far short of showing the "considered decision" or "clear and manifest purpose of Congress" needed to displace state law.[29]

B. Contrary to the View Taken in the Decision Below, If There Is Any National Policy Disclosed by the Decisions of This Court and the Silence of Congress, It Is a Policy of Permitting States to Apply Their Antitrust Laws to Organized Baseball.

Neither this Court's decisions in *Federal Baseball* or *Toolson*, nor the decisions of any other court that we have found, have either directly or by implication held that organized baseball is exempt from state antitrust laws. To the contrary, this Court's decisions in *Federal Baseball* and *Toolson* have always been thought to confirm state authority over the business of organized baseball, and Congressional failure to enact legislation on the matter supports continued state power. Moreover, on both occasions when organized baseball persuaded this Court to withhold application of federal antitrust law to its monopoly, it specifically represented that state regulation would continue to apply to it.

The first reported case to consider the applicability of the Sherman Act to organized baseball was *American League Baseball Club* v. *Chase*, 86 Misc. 441, 149 N.Y.S. 6 (Sup. Ct. 1914). There the Chicago club of the American League sued to enjoin a player from taking a job with a

[29] See *Hanna Mining Co.* v. *Marine Engineers*, 382 U.S. 181, 190 (1965); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 146 (1962); *California* v. *Zook*, 336 U.S. 725, 733 (1949).

rival club in the fledgling Federal League. The player defended on the ground that the reserve clause violated the federal antitrust law and the state common law condemning restraints of trade. The court refused to require compliance with the contract containing the reserve clause. It rejected the federal law defense on the ground that the business of baseball was not interstate trade or commerce and was not, therefore, subject to the Sherman Act. The court nevertheless held that the contract was unenforceable as an unlawful restraint of trade in violation of state common law. The court thus applied state antitrust law though holding that the Sherman Act was inapplicable. See also the earlier decisions in *American Base Ball & Athletic Exhibition Co.* v. *Harper*, 54 Central L. J. 449, 450-51 (Mo. Cir. Ct. 1902) (semble); *Allegheny Base Ball Club* v. *Bennett*, 14 Fed. 257, 259-60 (C.C.W.D. Pa. 1882).

Subsequent to the *Chase* decision, organized baseball used extra-legal means, such as threats of black-listing, and by such predatory acts of monopolization sought to drive the rival Federal League out of business. See H.R. Rep. No. 2002, 82d Cong., 2d Sess. (1952), pp. 50-57. After the Federal League dissolved, the defunct Baltimore club brought suit for treble damages against organized baseball charging a violation of the Sherman Act. Plaintiff succeeded in the District of Columbia trial court, but the court of appeals reversed, relying upon the *Chase* decision and holding that the Sherman Act did not apply to baseball. *National League* v. *Federal Baseball Club*, 269 Fed. 681, 686, 50 App. D. C. 165, 170 (1920). In this Court, respondents—organized baseball—relied heavily on the earlier *Chase* decision. See 259 U.S., at 206; respondents' brief, No. 204, 1921 Term, pp. 59-60. And respondents plainly adopted not only the Sherman Act holding in that case, but also the holding that baseball was subject to state law. They conspicuously urged that federal antitrust regulation of organized baseball was unnecessary to protect the public because organized baseball was subject to state law. They argued (brief, pp. 67-68):

> "Such a limitation on local self-government and such an extension of the powers of Congress is not justified by any great public necessity. *A State is entirely competent to reach and deal with any evil in the field of sport requiring legislative remedy. This is true as respects the provisions of players' contracts and the protection of the rights of the public in the matter of charges for admission, and other matters.*" [Emphasis supplied.]

Presented with these representations, this Court established, as a corollary to the federal antitrust exemption, that organized baseball is subject to state law, stating (259 U.S., at 208): "we are of opinion that the Court of Appeals was right. The business is giving exhibitions of base ball, which are purely state affairs."

In the ensuing years *Federal Baseball* was widely and almost uniformly cited to support state power over activities which, like baseball, had interstate aspects but were deemed to be "local" businesses.[30] The precedent of the

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[30] See, *e.g.*, *Metropolitan Casualty Ins. Co. of New York* v. *Huhn*, 165 Ga. 667, 676-77, 142 S.E. 121, 125 (1928) (state workmen's compensation act properly applied to baseball club); *Boynton* v. *Fox West Coast Theatres Corp.*, 60 F.2d 851, 853 (10th Cir. 1932) (enforcement of state Sunday law against motion picture theatres sustained); *Neugen* v. *Associated Chautauqua*, 70 F.2d 605 (10th Cir. 1934) (state workmen's compensation act may be applied to travelling entertainer); *In Re American States Public Service Co.*, 12 F.Supp. 667, 693 (D. Md. 1935) (dictum) ("it has been held, with respect to the following types of businesses, that the fact that the mails or instrumentalities of interstate commerce are used by them does not convert them into businesses of an interstate character, and thereby . . . immunize them from state regulation or control . . . athletic entertainers . . . *Federal Baseball Club* v. *National League*, 259 U.S. 200 . . . ."), modified, 81 F.2d 721 (4th Cir.), certiorari denied, 297 U.S. 724 (1936); *Matter of Mallia*, 299 N.Y. 232, 241, 86 N.E. 2d 577, 582 (1949) (state unemployment compensation law may be based on entire earnings of employee even though he travels across state lines and earns part of wages in another state).

Chase case—that organized baseball is subject to state antitrust regulation—until now has never been judicially questioned,[31] and was followed by the New York courts as recently as 1959. In *Blake* v. *Frick*, 20 Misc. 2d 520, 521-22, 191 N.Y.S. 2d 177, 179 (Sup. Ct. 1959), appeal dismissed, 9 App. Div. 2d 893, 199 N.Y.S. 2d 396 (1959), two minor league players sought a "declaratory judgment decreeing that the uniform player's contract . . . be adjudged void and unlawful, that the defendants be enjoined in New York from monopolizing the baseball business, [and] enforcing salary limtations . . . ." The court stated that insofar as the complaint sought relief with respect to a labor dispute, the action was pre-empted by the National Labor Relations Act. But insofar as the complaint sought a declaration as to the legality of the plaintiffs' contracts under the state antitrust laws, the court, relying on *Chase*, agreed that it stated a claim.

Indeed, at least one Congressional committee, which made a thorough study of organized baseball and court decisions on that subject, has apparently recognized the validity of the *Chase* decision and of state antitrust regulation of organized baseball. See H.R. Rep. No. 2002, 82nd Cong., 2nd Sess. (1952), pp. 127, 130.

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[31] See *American League Baseball Club* v. *Pasquel*, 188 Misc. 102, 66 N.Y.S. 2d 743 (Sup. Ct. 1946) (court finds that illegality probably no defense in suit by New York Yankees to enjoin Mexican League club from inducing players to breach their contracts with Yankees, but stating: "[*a*]*s defendants invoke the common law*, a New York statute, the Clayton Act . . . and . . . the Sherman Antitrust Act . . ., I pass the question whether or not under any circumstances exhibitions of baseball could be regarded as trade or commerce within the meaning of any of those statutes . . . ." [Emphasis supplied.]; *American League Baseball Club* v. *Pasquel*, 187 Misc. 230, 62 N.Y.S. 2d 537 (Sup. Ct. 1946) (considering legality of organized baseball structure under New York law, but refusing to issue a preliminary injunction). But compare *Oliphant v. New York Yankees, Inc.*, 42 Misc. 2d 394, 248 N.Y.S. 2d 350 (Civil Ct. 1964).

This Court's 1953 decision in *Toolson,* in declining to overrule the earlier *Federal Baseball* decision, did nothing to broaden it. *Toolson*—and its two companion cases which were disposed of in the same opinion—involved suits challenging organized baseball's enforcement of the reserve clause. Respondents (defendants) in the *Toolson* case again reminded this Court that organized baseball *was* amenable to state regulation. See respondents' brief, No. 18, 1953 Term, p. 30.

In the *Toolson* opinion this Court did no more than confirm the decision in *Federal Baseball* "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the *federal* antitrust laws." 346 U.S., at 357. [Emphasis supplied.] In subsequent lower court cases it has been assumed that *Toolson,* like *Federal Baseball,* supports state authority.[32]

This Court itself in subsequent cases, holding the theatrical, boxing and football businesses subject to the federal antitrust laws, has made clear the narrow scope of the *Toolson* decision. It has emphasized that *Toolson* was a "narrow application of the rule of *stare decisis,*" and that if "the *Toolson* holding is to be expanded—or contracted—the appropriate remedy lies with Congress." *United States* v. *Shubert,* 348 U.S. 222, 230 (1955). See also *United States* v. *International Boxing Club,* 348 U.S. 236, 243 (1955).

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[32] See, *e.g., New Orleans Opera Guild, Inc.* v. *Local 174, Musicians Mutual Protective Union,* 127 So. 2d 358, 361 (La. Ct. App. 1961) (state antitrust law may be applied to musicians union; no N.L.R.A. pre-emption), affirmed on other grounds, 242 La. 134, 134 So. 2d 901 (1961); *Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc.,* 149 Colo. 259, 272, 368 P.2d 970, 976-77 (1962) (dissent) (state can apply anti-discrimination law to airline pilots), reversed on other grounds, 372 U.S. 714 (1963); *Pennington* v. *Birmingham Baseball Club, Inc.,* 277 Ala. 336, 343, 170 So. 2d 410, 415-16 (1964) (state may enjoin unlawful picketing at baseball park despite N.L.R.A.).

More recently, this Court said again that "[a]s long as the Congress continues to acquiesce we should adhere to—but not extend—the interpretation of the Act made in those cases." *Radovich* v. *National Football League,* 352 U.S. 445, 451 (1957).[33]

If the silence of Congress reflects any decision to continue the exemption from federal law granted organized baseball by this Court, that silence necessarily involves approval of the corollary, originating in this Court's theory that baseball was a local affair, that the narrow federal antitrust exclusion approved by the Court did not bar state antitrust power.

Indeed, even the legislative history of unenacted bills to subject organized baseball to, or exempt it from, the federal antitrust laws discloses no purpose to pre-empt state law. So far as we know, not one bill has ever been introduced in Congress to exempt baseball from *state* antitrust laws,[34] nor has any committee of Congress proposed such legislation or suggested that existing federal legislation displaces state law.

C. There Was No Valid Reliance upon Pre-emption of State Law.

One reason given for this Court's decision in *Toolson* not to overrule *Federal Baseball* was organized baseball's

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[33] "[I]t is sound to confine *Toolson* to its particular factual situation." Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), p. 63.

[34] Bills have been in one of three categories: (1) to exempt baseball and other professional team sports from the federal antitrust laws; (2) to apply federal antitrust laws to baseball and other professional team sports; or (3) to exempt from federal antitrust laws certain aspects of baseball and other professional team sports.

For a capsule description and history, see Sen. Rep. No. 462, 89th Cong., 1st Sess. (1965), pp. 7-11. See also Pierce, *Organized Professional Team Sports and the Antitrust Laws,* 43 Cornell L.Q. 566, 573-74, 578-80 (1958).

reliance upon the continued validity of that ruling.[35] But even if Congress left the baseball decisions standing for the same reasons that this Court in *Toolson* did not overrule *Federal Baseball*, that purpose would not require displacement of state law.

Here—like the situation in *International Boxing*, 348 U.S., at 242—"[a]t the time the . . . complaint was filed, no court had ever held" that organized baseball was exempt from state antitrust laws. And, here—like the situation in *Shubert*, 348 U.S., at 228-29—at least one case (*Chase, supra*) had held that organized baseball was subject to state antitrust law. Moreover, in light of the uniform understanding that this Court's baseball decisions confirmed state power, and in light of respondents' representations to this Court, it ill behooves them to claim that they have relied over the years on the baseball decisions as immunizing them from state as well as federal antitrust laws. Even if Congress by its failure to overrule those decisions intended to preserve a reliance interest, that purpose does not now require granting immunity from state regulation. To the contrary, the purpose of preserving the existing state of the law is served only by sustaining state authority.

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[35] *Toolson*, 346 U.S., at 357; *Shubert*, 348 U.S., at 229-30; *Radovich*, 352 U.S., at 450-51.

However, *Toolson* evidently preserved the rationale of *Federal Baseball*—that baseball was not sufficiently interstate in character to come within the Sherman Act—in declining to overrule it. In *Radovich*, 352 U.S., at 451-52 this Court stated that "[w]e did not extend them [*Federal Baseball* and *Toolson*] to boxing or the theatre because we believe that the volume of interstate business in each—the rationale of *Federal Baseball*—was such that both activities were within the Act. Likewise, the volume of interstate business involved in organized professional football places it within the provisions of the Act." In *International Boxing*, 348 U.S., at 243 the Court noted that "[t]he controlling consideration in *Federal Baseball* [was] . . . the degree of interstate activity involved in the particular business under review."

Even if this were a case arising under the Sherman Act, preservation of respondents' reliance interest would not bar the antitrust enforcement sought here. *Federal Baseball* and *Toolson* both involved attacks on the validity of the reserve clause, which is claimed to be the keystone of the baseball structure. The decree of the Circuit Court here in no way affected the validity of the reserve clause. Rather, it ordered the respondents to deal in good faith with qualified Milwaukee applicants. The Circuit Court decree ordered them to award a franchise, sell players to the new franchise owner and arrange to play games and otherwise deal with the new franchise owner, actions which respondents have previously taken voluntarily for their own business reasons. Once respondents take the simple action necessary to comply with state law, their business would continue as before.[36]

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[36] Respondents may claim that the holdings of this Court in *Federal Baseball* and *Toolson* disclose a purpose to permit organized baseball, like the New York Stock Exchange, to be self-regulating and, therefore, exempt from the antitrust laws. We have demonstrated above that these cases and Congress' inaction disclose no such purpose. Nor is baseball self-regulating with respect to franchise shifts and expansion. The Commissioner is without jurisdiction to require expansion or prevent the relocation of franchises (R. 3168), and the National League Constitution provides no procedural or substantive standards for deciding upon expansion or a franchise relocation. (R. 2416, 2462; App. 157b, 196b). Under these circumstances, even if organized baseball enjoyed an antitrust exemption to the extent that it was self-regulating, it would enjoy none with respect to expansion or the relocation of franchises. Compare *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963). See also *Fashion Originators Guild* v. *Federal Trade Commission*, 312 U.S. 457 (1941).

II. THE HOLDING BELOW THAT THE COMMERCE CLAUSE OF ITS OWN FORCE BARS WISCONSIN'S ANTITRUST ACTION BECAUSE OF THE POSSIBILITY OF CONFLICT WITH THE LAW OF SOME OTHER STATE IS CONTRARY TO APPLICABLE DECISIONS OF THIS COURT

This Court has rejected the contention that a state antitrust law affecting interstate commerce is invalid under the Commerce Clause. In *Standard Oil Co.* v. *Tennessee*, 217 U.S. 413 (1910), it was held that Tennessee could constitutionally deal with efforts by Standard Oil of Kentucky to injure a Pennsylvania competitor by inducing Tennessee dealers to cancel orders. The Court noted that the statute was

> "not even directed against interference with that [interstate] business specifically, but against acts of a certain kind that the State disapproved in whatever connection. The mere fact that it may happen to remove an interference with commerce among the States as well with the rest does not invalidate it." 217 U.S., at 422.

Since then, most state and lower federal courts have consistently sustained state antitrust enforcement which affects interstate commerce.[37]

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[37] *State* v. *Sterling Theatres*, 64 Wash. 2d 761, 394 P.2d 226 (1964); *Henry G. Meigs, Inc.* v. *Empire Petroleum Co.*, 273 F.2d 424, 430-31 (7th Cir. 1960); *Peoples Savings Bank* v. *Stoddard*, 359 Mich. 297, 102 N.W. 2d 777 (1960); *Alfred M. Lewis, Inc.* v. *Warehousemen Local Union No. 542*, 163 Cal. App. 2d 771, 330 P.2d 53 (1958); *Oliver* v. *All-States Freight, Inc.*, 156 N.E. 2d 190 (Ohio Ct. App. 1957), appeal dismissed, 167 Ohio St. 299, 147 N.E. 2d 856 (1958), reversed on other grounds *sub nom. Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283 (1959); *Commonwealth* v. *McHugh*, 326 Mass. 249, 93 N.E. 2d 751 (1950), certiorari denied, 340 U.S. 911 (1951); *Mayer Bros. Poultry Farms* v. *Meltzer*, 274 App. Div. 169, 80 N.Y.S. 2d 874 (1948), appeal denied, 274 App. Div. 877, 83 N.Y.S. 2d 228 (1948); *Speegle* v. *Board of Fire Underwriters*, 29 Cal. 2d 34, 172 P.2d 867 (1946); *Leader Theatre Corp.* v. *Randforce Amusement Corp.*, 186 Misc. 280, 58 N.Y.S. 2d 304 (Sup. Ct. 1945), affirmed, 273 App. Div. 844, 76 N.Y.S. 2d 846 (1948); *Mathews Conveyor Co.* v. *Palmer-Bee Co.*, 135 F.2d 73 (6th Cir. 1943); *Opinion of the Justices*, 211 Mass. 620, 99 N.E. 294 (1912).

It thus seems plain that organized baseball, like any other business having interstate aspects, enjoys no general immunity under the Commerce Clause from state antitrust enforcement. Nor is the application of Wisconsin's law barred by the Commerce Clause in the particular circumstances of this case: "State regulation, based on police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 448 (1960). Accord, *Head* v. *New Mexico Board of Examiners*, 374 U.S. 424, 428-29 (1963).[38] The court below misapplied this well-established test.

The court below made no finding that Wisconsin's law as applied discriminated against interstate commerce. Instead, apart from its misplaced reliance upon a "national policy" presumed from Congress' inaction (pp. 19-25, *supra*), the decision on the Commerce Clause issue appears to rest on the lower court's determination that the Commerce Clause, of its own force, requires uniform national regulation of baseball—*i.e.*, in truth, no regulation at all—solely because of a possibility that the laws of some other state might in the future be applied in conflict with this application of Wisconsin's law. The court conceded that the "suggested confusion of state regulation does not appear presently to be a fact."[39] It speculated, however, that "there well may be a limit to the number of teams which can feasibly be included in a major league." The

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[38] State antitrust laws are a well-recognized exercise of the police power. See cases cited in footnote 18, *supra*.

[39] A decree ordering respondents to provide an expansion franchise to the Brewers or to the County would not conflict with any decree requiring the Braves to play in Atlanta. See *City of Atlanta* v. *Atlanta Braves, Inc.*, Civil No. B17638, Superior Court, Fulton County, Georgia; *City of Atlanta* v. *Houston Sports Assn.*, Civil No. 66-H-70, S.D. Tex.

court reasoned that "If Wisconsin can reach her problem by application of her antitrust statute, other states would have equal standing to apply other types of regulatory rules and procedures, involving different standards for decision." (R. 9494-95; App. 38a-39a). A potential for conflict—a large number of states seeking to force the award of a limited number of franchises—was the court's necessary hypothesis.

However, it was established in this case that some expansion of the major leagues (to include Milwaukee) was both feasible and desirable.[40] Milwaukee is a sound and proven baseball market which could be matched by few other cities. It is at present the second largest baseball market in the country without a major league franchise; and it is the only community which has been totally abandoned by the major leagues since 1903. Respondents, who had the burden of proof on the Commerce Clause issue, have wholly failed to establish that the major leagues cannot expand to serve the few cities which could support major league teams. Nor have they shown a likelihood that any other state would apply its law to compel expansion beyond the capability of the league or to require the location of a franchise in an untested and inadequate market. In short, respondents have failed to show even a potential conflict.

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[40] There are already 24 major league professional football teams with more in the offing. See S. Rep. No. 1654, 89th Cong., 2nd Sess. (1966). Insofar as the argument against expansion rests on an alleged shortage of skilled players, it should be noted that the 24 major league football teams have almost 1000 players on their active rosters, as compared to only 500 for the 20 major league baseball teams. If there is a shortage of skilled baseball players, it may well result from a long-term monopoly-created shortage of player job opportunities. Even major league hockey has announced plans to double the number of hockey franchises from 6 to 12. *New York Times*, Feb. 10, 1966, p. 1, col. 2.

But whether or not a potential for conflict appears on the face of this record, repeated decisions of this Court have established that the possibility of future conflict between state laws is not a ground for invalidating them under the Commerce Clause. *Head* v. *New Mexico Board of Examiners*, 374 U.S. 424, 429 (1963) (statute regulating advertising of optometrical devices); *Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc.*, 372 U.S. 714, 721-22 (1963) (anti-discrimination law); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 448 (1960) (smoke control ordinance); *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507, 523 (1947) (natural gas regulation). *Cf. Joseph E. Seagrams & Sons, Inc.* v. *Hostetter*, 384 U.S. 35, 46 (1966). See also *General Motors Corp.* v. *Washington*, 377 U.S. 436, 448-49 (1964); *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 462-63 (1959); *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 295 (1944) (state "double taxation" cases). For example, in *Huron*, Detroit's smoke control ordinance was challenged on the ground that conflicting requirements might be imposed by other states. This Court held that this possibility of conflict was not ground for striking down the Detroit law. An actual conflict, as in *Bibb* v. *Navajo Freight Lines*, 359 U.S. 520 (1959), not a potential conflict, must be shown.

In the remote event that the conflict feared by the court below should later ripen into an imminent or real one, that will be time enough to invoke the protection of the Commerce Clause. *Cf. Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 263 (1937) (Puerto Rico antitrust act). And, as this Court has emphasized in *Radovich*, 352 U.S., at 452, Congress also has authority under the Commerce Clause to afford relief if the alleged potential conflict should later materialize. Here, as in *Atlantic Coast Line R. Co.* v. *Georgia*, 234 U.S. 280, 292 (1914):

> "If there is a conflict in . . . local regulations, by which interstate commerce may be inconvenienced . . . there

> is a simple remedy; and it cannot be assumed that it will not be readily applied if there be real occasion for it. That remedy does not rest in a denial to the State, in the absence of conflicting Federal action, of its power to protect life and property within its borders, but it does lie in the exercise of the paramount authority of Congress in its control of interstate commerce to establish such regulations as in its judgment may be deemed appropriate and sufficient."

In summary, the decision of the court below is inconsistent with decisions of this Court holding potential conflict to be irrelevant, and, calls for review by this Court on writ of certiorari.[41]

CONCLUSION

This is one of those rare cases in which a state seeks certiorari to overturn a decision of its state supreme court striking down the application of state legislation on federal grounds. This Court should grant certiorari to correct the manifest error of the Wisconsin Supreme Court; "in order to clarify the application of the *Toolson* doctrine . . ." (*Radovich*, 352 U.S., at 447); and to correct a decision on the Commerce Clause issue which threatens the states'

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[41] For reasons which do not appear, the Wisconsin Supreme Court apparently held that enforcement of $5,000 statutory forfeitures against each respondent club, like the relief of an expansion franchise, would unduly interfere with interstate commerce. However, the award of the penalties does not create even a possibility of conflict among the states nor does it require the respondents to alter their operations in any respect whatsoever. In holding that the Commerce Clause is a barrier to this relief, the decision of the court below is clearly in error.

important powers to apply their antitrust laws to businesses with interstate aspects.

Respectfully submitted,

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In The

SUPREME COURT of the UNITED STATES

October Term, 1966

No. 659

STATE OF WISCONSIN,

Petitioner,

v.

MILWAUKEE BRAVES, INC., ET AL.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

WISCONSIN SUPREME COURT

MAJORITY OPINION

(Formal Parts Omitted)

APPEAL from a judgment of the circuit court for Milwaukee county: ELMER W. ROLLER, Circuit Judge. *Reversed.*

Action by the state of Wisconsin against the corporate owners of the ten baseball teams in the National League of Professional Baseball Clubs, and against the National League, to enforce sec. 133.01, Stats., an antitrust statute.

In 1953 the Boston Braves of the National League moved from Boston to Milwaukee, with the permission of the National League. The team had been purchased in 1945 by assuming an indebtedness of $311,000. In the last year in Boston the attendance was 240,000.

Milwaukee had not previously had a major league baseball team, but a new stadium had recently been erected by the county and it was leased to the Braves. Attendance in 1953 reached 1,826,397, and in that year the Braves finished in second place in the League. In each of the next four years, attendance was over 2,000,000, and the Braves finished in third, second, second, and first place, in those years. In 1958, attendance was 1,971,101, and the Braves again won the pennant. Attendance dropped each year thereafter, reaching 1,101,441 in 1961 and 766,921 in 1962. The Braves' final standings were second in 1959, second in 1960, fourth in 1961, and fifth in 1962. Profits before taxes in this entire period exceeded $7,500,000.

Late in 1962 a new corporation, controlled and largely owned by a new group, acquired the team and franchise for $6,218,480. In 1963 the attendance increased to 773,018 and the team finished in sixth place. In 1964 the attendance increased to 910,911 and the team finished in fifth place.

On October 21, 1964, the board of directors voted to transfer to Atlanta, Georgia. On November 7, the League approved the transfer, but the stadium lease ran to the end of 1965 and the county had begun suit to compel the Braves to fulfill it. The League directed the Braves to play their home games in Milwaukee in 1965. The Braves corporation signed a 25-year lease of a stadium in Atlanta.

In 1965, after the decision to move, attendance dropped to 555,584, and the team finished in fifth place. On or about January 1, 1966, the principal office of the corporation was moved to Atlanta, and the home games have been played there in 1966.

On August 6, 1965, the present action was brought by the state. The complaint described generally the agreements and relationships involved in the organization of professional baseball and alleged that as a result defendants and persons acting in concert with them have monopoly power over major league baseball; that defendants had agreed to an illegal plan to terminate playing of major league baseball in Milwaukee; and that they intended to and would restrain and prevent various types of trade and commerce involved in major league baseball in Milwaukee. The complaint sought recovery of forfeitures, as prescribed

by statute, and preliminary and permanent injunctions requiring defendants to facilitate the organization and operation of a major league professional baseball team with Milwaukee as its home, and restraining the Braves from playing home games outside Milwaukee until such required steps had been taken.

Defendants sought to remove the cause to the United States District Court for the Eastern District of Wisconsin, but on motion of the state that court remanded the cause to the circuit for Milwaukee county November 12, 1965. Demurrers were overruled by the circuit court.

After a lengthy trial, the circuit court made findings of fact and conclusions of law. In part they were as follows:

FINDINGS OF FACT

"5. The ten corporate defendants are engaged in the business of organizing, promoting and exhibiting professional baseball games played by teams of professional baseball players. Each of said corporate defendants operates a so-called Major League team playing a Major League championship schedule prepared by the defendant, National League. Under said schedule the team of each corporate defendant plays approximately one-half its scheduled championship games in [its home city] and the remainder divided equally at the location of the remaining corporate defendants' principal places of business. During a season the team of each corporate defendant plays an equal number of championship games with the team of each other corporate defendant.

"6. The teams of the corporate defendants are each comprised of professional baseball players, each of whom contracts his services to his employer under a form of contract known as the Uniform Player Contract.

"7. The American League of Professional Baseball Clubs is an unincorporated association comprised of ten corporate members which also organize, promote and exhibit professional baseball games by operating baseball teams which play a championship season schedule of the type described above. The said National League and American League are known as the Major Leagues. Each of the corporate members of each member League of the National Association of Professional Baseball Leagues also organizes, promotes and exhibits professional baseball games in other cities and under the rules of other leagues, these other leagues being known as the minor leagues. All minor

leagues are members of the National Association of Professional Baseball Leagues, an unincorporated association. The three unincorporated associations are governed by rules and regulations which recite the interrelation of their activities and the operations of the respective member corporate operators of baseball teams.

"8. Each championship professional baseball game is played on a home ball field of one of the league teams. Each ball field is enclosed from the public, and the public is charged an admission fee to see each game. The visiting baseball team receives a predetermined share of the admission proceeds.

"9. Each team holds a franchise from its respective league to operate a professional Major League baseball club in its franchised territory. The franchise is evidenced by a Certificate of Membership signed by the Major League president. There are ten franchises in each Major League. During the championship season, the corporate defendants do not schedule or play championship professional baseball games with any person to whom the National League has not issued a franchise.

"10. Each of the corporate defendants, including Milwaukee Braves, Inc., has approximately forty professional Major League baseball players under contract. Each of the corporate defendants owns the exclusive right to assign and renew the contract of each such Major League baseball player. Each of the corporate defendants either owns minor league professional baseball teams or has entered into working agreements with such teams, and is thereby able to obtain the services of a large number of minor league professional baseball players.

"11. Each of the corporate defendants plays its scheduled games in accordance with the National League championship schedule. Between January 1, 1953 and December 31, 1965, defendant Milwaukee Braves, Inc. annually played approximately one-half the games scheduled for it on the National League Championship schedule in Milwaukee County Stadium. For each of the years ended December 31, 1960 through 1964, inclusive, the annual receipts of defendant Milwaukee Braves, Inc. and of its corporate predecessor, National League Baseball Club of Milwaukee, Inc., from sales of tickets for such games exceeded $1,000,000.

"12. Each of the corporate defendants cooperates with radio and television stations and enters into contracts permitting radio and/or television broadcasting of certain of its championship games. Between January 1, 1960 and December 31, 1964, defendant Milwaukee Braves, Inc. and its corporate predecessor, National League Baseball Club of Milwaukee, Inc., entered into contracts permitting the radio and/or television broadcasting of championship games played in Milwaukee County Stadium. During that period, defendant Milwaukee Braves, Inc. and its corporate predecessor, National League Baseball Club of Milwaukee, Inc., sold the right to broadcast such games and received therefor substantial sums of money.

"13. The exhibition of Major League championship games attracts widespread public interest and is regularly publicized by newspapers and magazines and is broadcast by network television and radio. The exhibition of Major League baseball is a market separate and distinct from the exhibition of minor league or college baseball games, or other entertainment exhibitions.

". . .

"15. Professional baseball is organized by a series of interrelated agreements among the member teams of the National and American Leagues, between the two Major Leagues, among the minor leagues, and an association of minor leagues, and among the minor leagues. Through these agreements, substantially all relationships among the various leagues, teams, owners, agents and players are regulated.

"16. The corporate defendants are the only members of the National League. No additional members may be admitted to the National League without the unanimous consent of the corporate defendants.

"17. The defendants and the American League and its members are parties to the Major League Agreement.

"18. Defendants and the American League and its members have agreed to and do control the right to employ the services of substantially all present and future professional baseball players of Major League caliber, and have agreed to determine and do determine the time and place of exhibition and broadcast of all Major League games.

"19. The defendants and the American League and its members have agreed to and do prohibit all Major League professional baseball players from contracting to perform and from performing as players during their playing careers otherwise than upon the terms and conditions established by the National League and the American League and its members.

"20. The defendants and the American League and its members have agreed to and do designate and

limit the places where Major League professional baseball games may be exhibited to the public.

"21. The defendants and the American League and its members have agreed to and do prevent performances by all Major League professional baseball players and clubs, except upon terms and conditions determined by the defendants and the American League and its members.

"22. The defendants and the American League and its members have agreed to prescribe and enforce and have prescribed and enforced rules and regulations governing substantially all relationships among the various baseball leagues, teams, owners, agents and players.

"23. The defendants and the American League and its members have agreed to establish and have established the office of Commissioner of Baseball, and have agreed to permit him, and have permitted him, to arbitrate disputes and to enforce decisions, in accordance with the terms of the Major League Agreement and the Major League Rules.

"24. The Major League Agreement and the Major League Rules enable the defendants and the American League and its members to eliminate competition between them for the employment of professional baseball players and to prevent persons not parties to that agreement, the Professional Baseball Agreement or the National Association Agreement from engaging the services of professional baseball players.

"25. Over a period of many years, the defendants and the American League and its members have achieved adherence to the Major League Agreement, the Professional Baseball Agreement, and the National Association Agreement of all persons engaged in pro-

fessional baseball by the use, and threat of use, of practices such as refusing to deal with clubs and leagues not parties to said agreements and excluding from employment as a player any player who failed or refused to submit to or be bound by the terms of those agreements and rules promulgated pursuant thereto. Since the establishment of the American League, all attempts to organize additional Major Leagues have been prevented by the defendants and the American League and its members.

"26. The defendants have agreed to a plan to terminate, and acting together carried out their plan and have terminated the playing and exhibition of Major League baseball games in Milwaukee. The Major League Agreement, the Professional Baseball Agreement, the National Association Agreement, and Rules adopted pursuant to and in accordance with those Agreements, operate to prohibit the establishment of a Major League professional baseball team with Milwaukee as its home and Milwaukee County Stadium as its home grounds, unless such successor is granted a Certificate of Membership in the National League or the American League. Such agreements and rules prohibit Major League Baseball players from contracting to play Major League baseball in Milwaukee as members of the team of any person (including Milwaukee Brewers Baseball Club, Inc., and Milwaukee County) not a member of the National League or the American League. By entering into such agreements and adopting such rules the defendants and the members of the American League, have agreed to and do refrain from scheduling or playing Major League championship baseball games with the team of any person (including Milwaukee Brewers Baseball Club, Inc. and Milwaukee County) who might, without hav-

ing been admitted to membership in the National League or the American League, organize and prepare to operate a Major League baseball team with Milwaukee as its home and Milwaukee County Stadium as its home grounds.

"27. In July of 1963 Officers of defendant, Milwaukee Braves, Inc., first became interested in moving the team to Atlanta. This interest continued during the 1964 championship season. The rumors of the defendant Braves' interest in Atlanta printed in the local and national press during 1963 and 1964, adversely effected [sic] attendance at Milwaukee homes games during the 1963 and 1964 championship seasons . . .

"28. The exhibition of Major League professional baseball games in the City of Milwaukee has been terminated by the defendants. Major League professional baseball will not again be exhibited in Milwaukee, Wisconsin, until the National League or the American League locates a franchise in Milwaukee.

"29. The Milwaukee Brewers Baseball Club, Inc. and Milwaukee County have each made proper application to the National League and to the American League for membership therein. Each such League has failed or refused to grant each such application.

". . .

"38. The defendants and the American League and its member clubs, the National Association of Professional Baseball Leagues, the member leagues and member clubs of the aforementioned National Association, have an economic monopoly over the exhibition of professional baseball. The Constitution of the National League grants unlimited power and discretion to determine the location of a franchise; provides it no ob-

jective standards for determining whether or not to grant a request for a transfer of a franchise, and contains no rules of procedure which would accord the city, county or state from which any such proposed transfer would be made, an opportunity to be heard.

". . .

"40. Over the five year period *1960-1964* on a cash basis the Braves and their corporate predecessors realized income of $836,900. The Braves reported to their shareholders net losses of $43,378 in 1963 and $45,270 in 1964. Net income from operations was reported as $82,393 in 1963 and $104,730 in 1964. These net income figures were reduced by interest expense on funds borrowed to purchase the Braves of $125,771 and $150,000 respectively in arriving at the net loss figures. In 1964 $48,800 of expense in connection with relocation of the franchise were charged against income.

"41. Had scouting expenses been capitalized as were player acquisition and development costs as sound accounting methods would require, the Braves would have shown a net income of approximately $170,000 in 1963 and $151,000 in 1964.

"42. The Braves net receipts from the sale of radio and television broadcasting rights compare favorably with the net receipts of the defendant clubs that submitted figures to this court.

"43. During the period from 1953 through 1965, the Milwaukee Braves, Inc. and its corporate predecessors had a total home paid attendance of 19,551,163. This was greater than any club in either Major League with the exception of the defendant, Los Angeles (Brooklyn) Dodgers. The average annual attendance for this period in Milwaukee was over 1.5 million.

This average was the second highest of any club in either league. The attendance level was 31% more than the average of teams in the defendant National League and 52% higher than the average for teams in the American League. Milwaukee home attendance increased from 773,818 in 1962 to 910,911 in 1964, despite the rumored relocation of the franchise to Atlanta, Georgia. The level of Attendance in 1965 was not representative, due to the fact that the franchise was to be relocated in Atlanta, Georgia for the 1966 season.

"44. The Braves were financially successful during the time it operated a National league baseball club in Milwaukee. Milwaukee has the demographic economic and population characteristics necessary to support a Major League baseball club. Milwaukee has the ability to reasonably support a Major League team.

"45. That expansion of the National League is feasible."

The court also found that a substantial amount of business activity generated by and dependent upon the exhibition of major league games to large crowds, including radio and television broadcasting, has been prevented by termination of major league baseball in Milwaukee.

CONCLUSIONS OF LAW

"1. The defendant corporations have violated Section 133.01 of the Wisconsin Statutes (1963) in the following respects:

"a. Having agreed among themselves to control and allocate professional baseball players, to assign to the respective corporate defendants exclusive territorial rights and privileges respecting the exhibition of professional Major League baseball games, and to limit the number of members in the National League of Professional Baseball Clubs of which the defendants are all the constituent members, they have now agreed to transfer the site of Major League baseball exhibitions from Milwaukee, Wisconsin, to Atlanta, Georgia, with the result that trade and commerce within the State of Wisconsin have been substantially restrained.

"b. They have combined and conspired among themselves to monopolize the business of Major League professional baseball within the State of Wisconsin.

"2. The National League of Professional Baseball Clubs is and has been the means and instrumentality by which the corporate defendants have engaged in the practices referred to in Paragraph 1 hereof.

"3. By means of the practices outlined in Paragraph 1 hereof the corporate defendants and their counterpart members of the American League of Professional Baseball Clubs have acquired monopolistic control of all available ball players of Major League caliber with the result that the granting of permission from one of the said leagues in the form of a franchise to operate a Major League baseball team is necessary for any person to engage in the business of Professional Major League baseball.

"4. The corporate defendants' monopolistic control of Major League professional baseball requires the defendants to exercise reasonable control and to follow reasonable procedures in the issuance of memberships in the National League of Professional Baseball Clubs and in the definition of sites for baseball exhibitions and as respects the transfer of memberships.

"5. The transfer by the corporate defendants of the franchise in the National League of Professional Baseball Clubs from Milwaukee, Wisconsin, and the refusal to issue a replacement franchise allowing the exhibition of Major League baseball in Milwaukee, Wisconsin, was an unreasonable exercise of the monopolistic control of the business of Major League professional baseball and was in violation of Section 133.01, Wisconsin Statutes (1963).

"6. The refusal of the National League and the failure of the American League to issue a franchise to Milwaukee County or the Milwaukee Brewers Baseball Club, Inc., was a concerted refusal to deal in restraint of trade and commerce within the State of Wisconsin in violation of Section 133.01, Wisconsin Statutes (1963)."

On May 5, 1966, the circuit court entered judgment awarding the state recovery from each defendant of $5,000 plus costs and disbursements except that recovery from the League was limited to $100 costs. The judgment included injunctive relief, the provisions of which are summarized as follows:

Defendants are enjoined from refusing to grant the application for membership in the National League submitted by Milwaukee county or Milwaukee Brewers Baseball Club,

Inc., or by some other suitable person interested in operating a National League franchise with Milwaukee as its home; they are required to take action to facilitate the organization and operation of a major league baseball team with Milwaukee as its home beginning in 1967, including the granting of a franchise and the execution of an equitable plan for providing a supply of major league professional players for such team. Unless and until such franchise be granted, defendants are enjoined from playing the Braves' home schedule elsewhere than in Milwaukee county stadium, but this requirement was stayed until May 18, 1966, provided the defendants submit a satisfactory plan for expansion in 1967 to the court by May 16, 1966.

Defendants appealed. Enforcement of the judgment was stayed by the circuit court pending determination of the appeal.

Additional facts will be referred to in the opinion.

FAIRCHILD, J. It seems crystal clear that under today's structure of organized professional baseball, defendants and the members of the American League have complete power to control participation in major league baseball, and to control the number of teams and the location of their home games; that although the power is shared with the American League, defendants nevertheless have very substantial and effective power of control; that major league baseball, as now carried on, is a business in which large sums are invested, and substantial gains received by players and owners, and that many other business activities are generated by and dependent upon it; that all the con-

tinuous interaction which constitutes major league baseball, and which holds the interest and support of the public has for 13 years reached into Wisconsin, but it now operates entirely outside this state; that defendants have, by agreement among themselves to transfer the Braves, terminated very substantial business activity in Wisconsin, and are totally and effectively preventing its resumption at the present time. On their face, these facts support a conclusion that there is a combination or conspiracy in restraint of trade and commerce, declared illegal by the first sentence of sec. 133.01, Stats., as well as a combination to monopolize trade, under the third sentence of the section.

The defense to a charge of violating that section appears to be grounded upon three principal contentions:

(1) Sec. 133.01, Stats., does not apply to this type of business;

(2) State regulation of the location of franchises and admission to the League would conflict with congressional policy and unreasonably burden interstate commerce;

(3) If the state has any power to proscribe a decision to transfer a franchise unless reasonably arrived at, the Braves' decision to move from Milwaukee and the concurrence of the other defendants were reasonably arrived at.

1. *Applicability of sec. 133.01, Stats.* It is the contention of defendants that the exhibition of major league baseball games is the supply of a service, not an article or commodity, and that sec. 133.01 prohibits only restraints of trade or commerce in articles or commodities. The claim

is that the second sentence in the section restricts the meaning of the first and third sentences.

There are six sentences in sec. 133.01 (1), Stats., but only the first three need be considered in this context. The first sentence provides:

> "Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal."

The second sentence, condensed, provides that every combination, etc., "intended to restrain or prevent competition in the supply or price of any article or commodity . . ." or which "shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be . . . sold in this state . . . is hereby declared an illegal restraint of trade."

The third sentence, condensed, provides that every party to any combination, etc., "herein declared unlawful or declared to be in restraint of trade, or who shall combine or conspire with any other person . . . to monopolize or attempt to monopolize any part of the trade or commerce in this state" shall forfeit for each such offense not less than $100 nor more than $5,000.

The language is open to the construction that the second sentence is a specific declaration that certain types of combination with respect to the supply or price of an *article* or *commodity* are illegal restraints of trade, but that the first sentence of sec. 133.01 (1), Stats., still embraces other types of restraint of trade not specifically enumer-

ated or described. The third sentence, which imposes a forfeiture, is consistent with this construction, for it imposes a forfeiture on a party to a combination "herein declared unlawful" (first sentence) "or declared to be in restraint of trade" (second sentence). It also suggests broad rather than narrow construction of the section, by imposing a forfeiture on anyone who shall conspire to monopolize any part of the trade or commerce in this state.

The first sentence is identical with sec. 1, ch. 219, Laws of 1893. Sec. 2 of that act imposed a forfeiture for monopolizing or conspiring to monopolize trade or commerce and sec. 5 allowed recovery of damages. The act contained no provision limited to articles or commodities. In the Revised Statutes of 1898, secs. 1, 2 and 5 were combined into sec. 1747e. The second sentence of present sec. 133.01 (1) was inserted by amendment of sec. 1747e by ch. 458, Laws of 1921. There is even less reason for supposing that the second sentence was an exclusive definition of the restraint of trade declared illegal by the first sentence or of the type of monopolization proscribed by the third sentence than if it had been part of the statute when first enacted.

Sec. 133.21, Stats., contains language very similar to the second sentence of sec. 133.01 (1) and provides that any corporation which shall enter into any combination so described, with respect to an article or commodity, shall have its charter canceled. The source of this section was ch. 357, Laws of 1897, later appearing as sec. 1791j-1791m, R. S. 1898. Defendants call our attention to an opinion of the attorney general, 1908 Op. Atty. Gen. 495, stating that a combination of insurance companies seeking to regulate

commissions paid to agents did not violate sec. 1791j because an agent's services are not a commodity. No reference was made to sec. 1747e in that opinion.

This court, however, in 1914, pointed out that sec. 1747e was taken from the Sherman Act and should receive the same interpretation as that which was placed in the federal act by the supreme court of the United States.[1]

Defendants call our attention to the defeat in 1949 of a bill to amend the second sentence of sec. 133.01 (1), Stats., by adding the words "or service." It appears that there had been a circuit court decision stating, as dictum, that sec. 133.01 (1) would not apply to contracts fixing the prices of personal services. Although the defeat of the bill is consistent with defendants' position, we conclude that the insertion of the second sentence in 1921 did not limit the broad language of the first or third sentences to the types of combination described in the second.

Defendants also contend that because of the policy of this court of construing sec. 133.01, Stats., consistently with constructions of the Sherman Act, as pronounced by the supreme court of the United States, we should read into our statute the anomalous exemption from the federal act which organized baseball uniquely enjoys. The history of the development of this exemption will be noted elsewhere. Because of such history we do not deem the relevant decisions the type of construction of the meaning of the federal statute which ought to apply to our own.

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[1]Pulpwood Co. v. Green Bay P. & F. Co. (1914), 157 Wis. 604, 625, 147 N. W. 1058. See State v. Lewis and Leidersdorf Co. (1930), 201 Wis. 543, 549, 230 N. W. 692.

2. *The power of the state to apply its antitrust law in this instance.* We are dealing with the very fabric of the organization of commercial baseball, the power over participation in this activity which results from the fact that there is an organization, and, in this particular instance, an exercise of such power to the detriment of a community. One of the difficulties in dealing logically with such matters arises from the fact that the leagues have evolved along with the growth of organized baseball and that major league baseball as we know it is inseparable from the existence of leagues, some degree of control over free competition among teams and players, and some limitation of the number and capability of the constituent teams.

For an interesting history of the hundred-year evolution of the "organization" of commercially-exhibited baseball, see Report No. 2002, House of Representatives, 2d Session, 82d Congress, "Organized Baseball," resulting from hearings of the Subcommittee on Study of Monopoly Power of the Committee on the Judiciary, May 27, 1952.

As part of its Conclusion, the Subcommittee said, at p. 229:

> "The subcommittee recognizes, however, that baseball is a unique industry. Of necessity, the several clubs in each league must act as partners as well as competitors. . . The history of baseball has demonstrated that cooperation in many of the details of the operation of the baseball business is essential to the maintenance of honest and vigorous competition on the playing field. For this reason organized baseball has adopted a system of rules and regulation that would be entirely inappropriate in an ordinary industry."

At least two courts have recognized the unique business character of organized professional sports and the necessity for a league structure.[2] In *United States v. National Football League*[3] it was stated:

> "Professional football is a unique type of business. Like other professional sports which are organized on a league basis it has problems which no other business has. The ordinary business makes every effort to sell as much of its product or services as it can. In the course of doing this it may and often does put many of its competitors out of business. The ordinary businessman is not troubled by the knowledge that he is doing so well that this competitors are being driven out of business.
>
> "Professional teams in a league, however, must not compete too well with each other in a business way. On the playing field, of course, they must compete as hard as they can all the time. But it is not necessary and indeed it is unwise for all the teams to compete as hard as they can against each other in a business way. If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably."[4]

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[2]United States v. National Football League (E. D. Pa. 1953), 116 Fed. Supp. 319, 323; American Football League v. National Football League (D. Md. 1962), 205 Fed. Supp. 60, 62, aff'd (4th Cir. 1963), 323 Fed. (2d) 124. See also, Professional Sports Act of 1965, Calendar No. 446, Report No. 462, p. 12 (Exh. No. 526).

[3]Supra, footnote 2.

[4]Ibid. at p. 323.

The state appears to argue that the existence of defendants' power to deprive a community of existing activity in major league baseball plus their exercise of such power with respect to a Wisconsin community is per se a violation of our law. The first paragraph of the conclusions of law of the circuit court appears to be in agreement with this contention.

The state argues, additionally, however, that even if monopoly power must be acecpted as a concomitant of major league baseball, because of the necessity for league organization, a monopoly has a legal duty to deal reasonably with those who desire to deal with it. The circuit court, as stated in the conclusions of law, agreed, and considered that the transfer of the Braves accompanied by refusal of the league to enfranchise a new Milwaukee team was an unreasonable exercise of monopoly power.

Thus, on this second theory, the circuit court may have recognized the practical necessity of the existence of monopoly power in the members of the major leagues, and have felt that the mere use of that power in depriving a community of major league baseball would not be a violation if the defendants reasonably determined that continued operation in the community would entail losses which would eventually destroy the member club. Evidently the court concluded that the Braves or some other team could have operated profitably in Milwaukee, and the decision to transfer the Braves to Atlanta without enfranchising a new Milwaukee team was an unreasonable one.

But whether unreasonableness of the decision must be or was sufficiently proved or not, or whether the exercise of defendants' power, and resulting destruction of business activity in this state would be enough to constitute a violation in any event, the question arises whether the state law can be applied, either because of the interstate character of the business of major league baseball, or because of such interstate character combined with the unique exemption which such business enjoys under the federal antitrust laws. Because our conclusion on this question disposes of the case, we assume, without deciding, that the findings and conclusions of the circuit court with respect to reasonableness can be sustained. The substantial injury to business activity within Wisconsin caused by the defendants' exercise of their monopoly power is clear, and we assume, at this point, that a violation of Wisconsin law has occurred if our law can be applied.

It is evident that the activity of major league baseball, spread through eight states in the National League and nine states and the District of Columbia in the American League is interstate commerce. Any suggestion to the contrary in 1922 in the *Federal Baseball Case, infra,* has been effectively overruled in the subsequent decisions explaining the exemption enjoyed by organized baseball, hereinafter discussed, and those cases now make it clear that organized baseball is interstate commerce and Congress may therefore regulate it.

Not only are defendants engaged in interstate commerce which involves activity within Wisconsin, but en-

forcement of the antitrust policy of Wisconsin would directly affect defendants' operations outside the state as well.

Application of our law to the situation before us would, in essence, require the league to admit a new member-club. Although the judgment contains a provision requiring the Braves to return, we view it as an optional alternative to the relief which is more consistent with the policy of an antitrust law, namely expansion in membership when major league baseball is to be extended into new territory. It would be inconsistent with the very policy of an antitrust law for Wisconsin to insist that the Braves be returned without expansion, because such an outcome would maintain the monopoly at the expense of Atlanta, or communities elsewhere which might seek to have a team. What the circuit court decision says, as we view it, is that as long as it is economically feasible for a major league team to have its home in Milwaukee, defendants must not use their monopoly power to deprive Milwaukee of a home team, but defendants were and still are free to choose whether the Braves should continue in Milwaukee or some new team should operate there.

Because of the nature of the competition within the league and the mechanics of game schedules, it is obvious that expansion in league membership would affect the activities of every defendant, at least to the extent of games between the new and old members at the home location of each, a change in number of games played, and other incidents of scheduling. It also appears that expansion requires a reallotment of available players among all the teams, or some other means of supplying a new team or

teams with a sufficient number of players of the requisite ability.

It is clear that in the absence of the antitrust feature of defendants' agreement to remove the Braves (i.e., exercise of monopoly power and agreement in restraint of trade) the state would have no power to prevent or impede the removal of a business enterprise even though such removal injured the interest of the state in preserving business activity within its borders.[5]

The question to be decided under the commerce and supremacy clauses of the constitution of the United States is: Does the presence and exercise of monopoly power arising out of the nature of the organization of baseball permit the application of the state's policy in this instance?

The state may, ordinarily, protect the interests of its people by enforcing its antitrust act against persons doing business in interstate commerce, but then, ordinarily, the federal government has an antitrust policy like that of the state.[6] In the case of organized baseball, however, there is no applicable federal antitrust law. The history of judicial action and legislative inaction with respect to organized baseball at least suggests a federal policy of approval of the existing structure, and the question readily arises

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[5]**Oklahoma v. Kansas Nat. Gas Co.** (1911), 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716; **Penna v. West Virginia** (1923), 262 U. S. 553, 43 Sup. Ct. 658, 67 L. Ed. 1117; **Toomer v. Witsell** (1948), 334 U. S. 385, 68 Sup. Ct. 1156, 92 L. Ed. 1460; **Hood & Sons v. Du Mond** (1949), 336 U. S. 525, 69 Sup. Ct. 657, 93 L. Ed. 865.

[6]**State v. Allied Chemical & Dye Corp.** (1960), 9 Wis. (2d) 290, 295, 101 N. W. (2d) 133.

whether there is a conflict between state and federal policy, so that the state policy must yield.

We emphasize that we are dealing here with a decision by the league as to the number and identity of its members (since the real vice of defendants' decision to move the Braves to a different location is the refusal to admit to membership a team with its home in Milwaukee). And a decision by the league on such a matter is a necessary incident of existence as a league.

The baseball exemption from federal antitrust laws was initially determined in 1922 by the decision of the supreme court of the United States in *Federal Club v. National League*.[7] A league of eight clubs, known as the Federal League, had attempted to become a major league. A settlement of this "baseball war" was reached by agreement among all parties except one club in the new league. It brought suit against the major leagues and others, claiming treble damages because the settlement agreement allegedly violated the Sherman Act.

In an opinion by Mr. Justice Holmes, the court held that exhibitions of baseball were purely state affairs, were not trade or commerce in the ordinarily accepted use of the words, and the interstate transportation of players was merely incidental.[8] This case, of course, involved an aspect of control over participation in major league baseball closely related to the one now before us.

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[7](1922), 259 U. S. 200, 42 Sup. Ct. 465, 66 L. Ed. 898.

[8]See also, **National League, etc. v. Federal Baseball Club (1920), 269 Fed. 681, for the opinion of the Court of Appeals of the District of Columbia, affirmed and relied upon by the supreme court.**

31 years later the question again reached the supreme court of the United States in *Toolson v. New York Yankees.*[9] This and companion cases were treble damage actions by players who alleged they were damaged by control of their freedom to participate as players. The short *per curiam* decision (from which two justices dissented) appears to treat *Federal Baseball* as a decision that Congress did not intend to include the business of baseball within the federal antitrust laws, to suggest that the court might not have reached the same decision in 1953 as it did in 1922, but to hold that because the business had developed for 30 years on the understanding that it was exempt, any change should be left to Congress where legislation would have only prospective effect. The court also noted that Congress had had the ruling under consideration, but had not seen fit to legislate on the subject.

The court's view of the situation was made more explicit in two subsequent cases.

In *United States v. Shubert*[10] (applying the Sherman Act to the performance of legitimate stage attractions), the court said, at pp. 229-230:

> "In *Toolson,* where the issue was the same as in *Federal Baseball,* the Court was confronted with a unique combination of circumstances. For over 30 years there had stood a decision of this Court spe-

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[9](1953), 346 U. S. 356, 74 Sup. Ct. 78, 98 L. Ed. 64, affirming **Toolson v. New York Yankees** (U. S. D. C., S. D., Calif. 1951), 101 Fed. Supp. 93, **Toolson v. New York Yankees** (9th Cir. 1952), 200 Fed. (2d) 198, **Kowalski v. Chandler** (6th Cir. 1953), 202 Fed. (2d) 413, and **Corbett et al. v. Chandler et al.** (6th Cir. 1953), 202 Fed. (2d) 428.

[10](1955), 348 U. S. 222, 75 Sup. Ct. 277, 99 L. Ed. 279.

cifically fixing the status of the baseball business under the antitrust laws and more particularly the validity of the so-called 'reserve clause.' During this period, in reliance on the *Federal Baseball* precedent, the baseball business had grown and developed. . . . And Congress, although it had actively considered the ruling, had not seen fit to reject it by amendatory legislation. Against this background, the Court in *Toolson* was asked to overrule *Federal Baseball* on the ground that it was out of step with subsequent decisions reflecting present-day concepts of interstate commerce. The Court, in view of the circumstances of the case, declined to do so. But neither did the Court necessarily reaffirm all that was said in *Federal Baseball*. Instead, '[w]ithout reexamination of the underlying issues,' the Court adhered to *Federal Baseball* 'so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.' 356 U. S. at 357. In short, *Toolson* was a narrow application of the rule of stare decisis."

The baseball cases were also discussed in *Radovich v. Nat. Football League*:[11]

"... In *Toolson* we continued to hold the umbrella over baseball that was placed there some 31 years earlier by *Federal Baseball*. The Court did this because it was concluded that more harm would be done in overruling *Federal Baseball* than in upholding a ruling which at best was of dubious validity. Vast efforts had gone into the development and organization of baseball since that decision and enormous capital had been invested in reliance on its permanence.

[11] (1957), 352 U. S. 445, 77 Sup. Ct. 390, 1 L. Ed. (2d) 456.

Congress had chosen to make no change. All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that it should sustain the unequivocal line of authority reaching over many years.

"The Court was careful to restrict *Toolson's* coverage to baseball, following the judgment of *Federal Baseball* only so far as it 'determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.' . . . As long as the Congress continues to acquiesce we should adhere to—but not extend—the interpretation of the Act made in those cases. . . .

"If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But *Federal Baseball* held the business of baseball outside the scope of the Act. No other business claiming the coverage of those cases has such an adjudication. We, therefore, conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by court decision. Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike. The whole scope of congressional action would be known long in advance and effective dates for the legislation could be set in the future without the injustices of retroactivity and surprise which might follow court action. Of course, the doctrine of *Toolson*

and *Federal Baseball* must yield to any congressional action and continues only at its sufferance. . . ."[12]

On July 16, 1965, a Report from the Committee on the Judiciary (Senate) stated:

> "The Congress has shown awareness of the problems created by the various decisions of the Supreme Court affecting organized professional team sports and has given consideration to their antitrust aspects for 14 years. In that time approximately 60 bills have been introduced dealing with the status of professional team sports under the antitrust laws. Some of these bills sought to remedy the anomaly under which baseball was held to be outside the antitrust laws while other professional sports were declared within those laws."[13]

Thus it appears that organized baseball enjoys, by reason of long continued reliance on *Federal Baseball* and the policy reasoning of the supreme court that any change should be brought about by legislation, with prospective effect only, an exemption from the federal antitrust laws which no other organized sport enjoys even where the structure and operation of the organization may be similar.

We venture to guess that this exemption does not cover every type of business activity to which a baseball club or league might be a party and does not protect clubs or leagues from application of the federal acts to activities which are not incidental to the maintenance of league struc-

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[12]Id. pp. 450-452.

[13]Professional Sports Act of 1965, Calendar No. 446, Report No. 462, p. 6 (Exh. No. 526).

ture,[14] but it does seem clear that the exemption at least covers the agreements and rules which provide for the structure of the organization and the decisions which are necessary steps in maintaining it. The type of decision involved in this case, in essence, whether to admit a new member in order to replace an existing member which desired to move to a new area, appears to be so much an incident of league operation as to fall within the exemption.

If Congress were to provide expressly that these matters were, for the present, to be left free from state as well as federal control, no state would have the power to regulate, reexamine, or review, or find violation of its antitrust law in decisions made with respect to location or transfer of a franchise or with respect to admissions to membership.

But we do not have an express provision, and the question is whether such intent is to be implied under the circumstances.

One author has described the problem as follows:

> ". . . The problem is not identical with the ascertainment of the intent of Congress, as that phrase is commonly used in the construction of a given statute. Rather the Court is seeking consistency with the tendency manifested by the relevant action of Congress. Thus it seems fair to say the Court seeks consistency with the policy apparent in federal legislation, so far

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[14]See **United States v. National Football League** (E. D. Pa. 1953), 116 Fed. Supp. 319, holding restrictions imposed by the National Football League on the sale of radio and television rights illegal; Report No. 2002, House of Representatives, 2d Session, 82d Congress, "Organized Baseball," pp. 7, 230 (Exh. No. 7).

as the Court can ascertain that policy. The Court has to guess, and in guessing it is likely to conceive that its wisdom coincides with the wisdom of Congress. Where no relevant policy can be perceived, the will of Congress is nonexistent.

"In effect, then, this approach emphasizes the idea that state statutes, having a material relation to interstate commerce, are to fail if they do not fit into the federal legislative policy for such commerce. That scheme of things involves three familiar categories: (1) subjects which are to be free from all regulation, at least for the time being; (2) subjects which Congress has regulated directly or through its agencies; and (3) subjects which Congress desires to be left to the states, at least for the time being. . . ."[15]

The supreme court of the United States has said that "the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the Congressional purpose" but "The nature and extent of that implication depend upon the nature of the Congressional power and the effect of its exercise." The court explained further, in a footnote:

"The failure of Congress to regulate interstate commerce has generally been taken to signify a Congressional purpose to leave undisturbed the authority of the states to make regulations affecting the commerce in matters of peculiarly local concern, but to withhold from them authority to make regulations affecting those phases of it which, because of the need of a national uniformity, demand that their regulation,

[15]Ribble, State and National Power Over Commerce, Columbia University Press (1937), p. 212.

if any, be prescribed by a single authority [citing cases]."[18]

The court has also said that while various tests may be used for guidance as to the regulatory power left to the states where Congress is silent, the ultimate question is whether the state action conflicts with national policy:

"Certain first principles are no longer in doubt. Whether as inference from congressional silence, or as a negative implication from the grant of power itself, when Congress has not specifically acted we have accepted the *Cooley* case's broad delineation of the areas of state and national power over interstate commerce. *Cooley v. Port Wardens*, 12 How. 299; *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 768. See Ribble, *State and National Power Over Commerce*, ch. 10. Absent congressional action, the familiar test is that of uniformity versus locality: if a case falls within an area in commerce thought to demand a uniform national rule, state action is struck down. If the activity is one of predominantly local interest, state action is sustained. More accurately, the question is whether the state interest is outweighed by a national interest in the unhampered operation of interstate commerce.

"There is no longer any question that Congress can redefine the areas of local and national predominance, *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408; *Southern Pacific Co. v. Arizona, supra*, at 769, despite theoretical inconsistency with the rationale of the Commerce Clause as a limitation in its own right. The words of the Clause—a grant of power—admit of no other result. When Congress enters the field by leg-

[18] Graves v. N. Y. ex rel. O'Keefe (1939), 306 U. S. 466, 479, 59 Sup Ct. 595, 83 L. Ed. 927.

islation, we try to discover to what extent it intended to exercise its power of redefinition; here we are closer to an intent that can be demonstrated with assurance, although we may employ presumptions grounded in experience in doubtful cases.

"But whether Congress has or has not expressed itself, the fundamental inquiry, broadly stated, is the same: does the state action conflict with national policy? The *Cooley* rule and its later application, *Southern Pacific Co. v. Arizona, supra*, the question of congressional 'ocupation of the field,' and the search for conflict in the very terms of state and federal statutes are but three separate particularizations of this initial principle."[17]

The situation which confronts us is not one where Congress has been silent as to a particular type of regulation in a broad field of interstate commerce, where the

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[17]**California v. Zook** (1949), 336 U. S. 725, 728-729, 69 Sup. Ct. 841, 93 L. Ed. 1005. See also, **Southern Pacific Co. v. Arizona** (1945), 325 U. S. 761, 767-768, 65 Sup. Ct. 1515, 89 L. Ed. 1915, wherein it is stated: "But ever since **Gibbons v. Ogden** . . . the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority . . . **Whether or not this long-recognized distribution of power between the national and the state governments is predicated upon the implications of the commerce clause itself . . . or upon the presumed intention of Congress, where Congress has not spoken . . . the result is the same.**" (Emphasis added); Flynn, **Federalism and State Antitrust Regulation** (1964 Michigan Legal Publications), wherein the author states on p. 199: "What is being suggested therefore is that in the area of concurrent state and federal jurisdiction, state antitrust laws should only be exempted or suspended from operation to the extent that federal antitrust laws are precluded from operation by federal regulatory legislation and antitrust exemptions. To permit application of state antitrust policy where federal antitrust policy is forbidden to tread, would defeat, obstruct, and frustrate the congressional scheme of regulation or defeat a national policy enunciated by an exemption from the federal antitrust laws." Also, Dowling, **Interstate Commerce and State Power**, 27 Va. Law Rev. 1 (1940).

proposition may readily be implied that although no need has been found for federal regulation, state regulation of local aspects may be quite appropriate. Rather, here, Congress has remained silent as to regulation of a particular industry, either by imposition of antitrust laws or otherwise, in the face of and seemingly in response to a series of judicial decisions which uniquely and emphatically pose the question to Congress of whether there shall be regulation in antitrust terms or otherwise. This industry has been organized for many years with a structure of which monopoly and restraint of trade are characteristics. The decisions suggest the probability, if not certainty, that the operations of organized baseball are rife with violation of the Sherman Act if it were to be applied, decline to apply the act because of the investment which has been made in reliance upon the belief that the act does not apply and, because of the havoc that retrospective application of the act would cause, call upon Congress to enact whatever regulation for the future it deems wise.

Reports of committees of both houses already referred to[18] show that substantial attention has been given to the question. The fact that Congress will, when motivated, act in response to judicial concern over organized professional sports is shown by its action following a federal court decision holding that certain television practices of the National Football League violated federal antitrust laws.[19]

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[18]Report No. 2002, House of Representatives, 2d Session, 82d Congress, "Organized Baseball;" Professional Sports Act of 1965, Calendar No. 446, Report No. 462, p. 6 (Exh. No. 526).

[19]**United States v. National Football League** (1953), 116 Fed. Supp. 319 and (1961), 196 Fed. Supp. 445 (construction of final judgment).

Congress enacted a statute which permits the member clubs of a league in the organized team sports to pool their individual television rights for sale by the league as a package.[20]

It is plausibly argued that silence of Congress in this context demonstrates congressional recognition that league structure and the related agreements and rules are integral parts of professional baseball as it exists, and that the application of the familiar type of antitrust legislation to the structural arrangements of organized baseball is inappropriate; that the control of the various elements of the structure which would otherwise involve prohibited monopoly or agreement in restraint of trade or commerce is, for the present, to be left completely to those who have that authority under the agreements and rules which cement the structure; that there is to be self regulation until such time as Congress decides that the public interest requires other control.

Some members of this court, including the writer of this opinion, conclude that the silence of Congress in this context sufficiently implies such policy, and that application and enforcement of a state antitrust law to decisions of the league as to the location of franchises and membership in the league would conflict with the national policy in this segment of interstate commerce. We deem it unrealistic to interpret these decisions of the supreme court of the United States plus the silence of Congress as cre-

[20]Public Law 87-331, Sept. 30, 1961; H. R. 9096, 87th Congress.

ating a mere vacuum in national policy, leaving the states free to regulate the membership of the baseball leagues.

Other members of the court prefer the view that the structure of the leagues, their decisions as to their own membership, location of franchises, and things of that nature, require uniformity of regulation, and since organized baseball operates widely in interstate commerce, the regulation, if there is to be any, must be prescribed by Congress.[21]

As already pointed out, the operations of each league cover a number of states. Wisconsin is presently concerned over the problem created by removal of a team from one its communities. Other states (Washington, for example, or Georgia if the Braves had not moved there) have no major league baseball activity but have an interest in the granting of a franchise in some presumably eligible community within them. Texas, one of whose communities has a team, and is therefore not faced with a serious problem of obtaining personal jurisdiction, has an apparent interest in a favorable decision on application by a club in another of its communities. There may well be a limit to the number of teams which can feasibly be included in a major league, and the answer to this question involves the exercise of discretion. There could be an applicant in a community which is economically incapable of supporting a team, and economic feasibility is another issue to be decided. There may well be thought to be a national interest in a wider distribution of available franchises throughout

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[21]Graves v. N. Y. ex rel. O'Keefe, supra, footnote 16.

the country, but it may be doubted that a state will be objective in deciding whether that is an appropriate consideration, nor what the answer should be in a given case. If Wisconsin can reach her problem by application of her antitrust statute, other states would have equal standing to apply other types of regulatory rules and procedures, involving differing standards for decision. We have already observed that the regulations of league membership imposed by any state necessarily affects activities of members in other states.

It is true that the suggested confusion of state regulation does not appear presently to be a fact,[22] but those who adhere to this view consider that variance in the local interests, and the standards which would be applied, and the impact of a state's action on activities outside its borders are sufficient that we should not read into the silence of Congress permission for the individual states to regulate these matters.

A majority of this court (though not in complete agreement as to which of the two theories just stated is controlling), conclude that the Wisconsin antitrust statute cannot, because of requirements of the federal constitution, be applied to concerted action by the defendants in moving the Braves from Milwaukee and refusing applications by others for a franchise.

Accordingly the judgment will be reversed and the complaint dismissed.

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[22]Cf. **Huron Portland Cement Co. v. Detroit** (1960), 362 U. S. 440, 448, 80 Sup. Ct. 813, 4 L. Ed. (2d) 852.

We must observe, however, that the record in this case emphasizes the existence of a problem, even though the state is powerless to deal with it. The record strongly suggests that the defendants gave little heed to the interests of the Milwaukee community, and to the injury which the move would cause. There ought, we think, to be included in any law which Congress may pass upon this subject some provision which would protect communities, either those who have or hope to have home teams, from arbitrary and unfair dealing.

By the Court.—Judgment reversed, cause remanded with directions to dismiss the complaint.

DISSENTING OPINION

(Formal Parts Omitted)

HEFFERNAN, HALLOWS, BEILFUSS, JJ. (dissenting). We respectfully dissent from the opinion of the majority and conclude there is neither federal pre-emption of the Wisconsin law nor is the remedy sought by the State of Wisconsin in this action of a nature that the enforcement of the trial court's order will burden interstate commerce in the sense proscribed by the constitution. The majority opinion admits that the operations of baseball complained of clearly violate the well established standards of business behavior prescribed by Wisconsin antitrust statutes. Moreover, the majority opinion specifically subscribes to the trial court's findings that these specific violations of law by organized baseball have caused substantial injury to business activity in Wisconsin.

We are thus confronted with activities carried on by a business enterprise that, in the absence of some immunity, are clearly unlawful. The majority finds that there is such immunity and, alternatively, bases that conclusion upon two reasons: (1) that the silence of Congress evinces a congressional policy that baseball shall be free of all control, state as well as federal; and (2) that any state regulation of baseball is *ipso facto* a burden on interstate commerce, since, by its nature, professional baseball is an area of commerce that can be controlled, if at all, only by uniform rules that in a practical sense can be promulgated by Congress alone. It is noteworthy that the opinion of the majortiy does not reflect unanimity of its reasons but only the result.

The argument of the majority is that the failure of the Congress to act in the face of the importunings of the United States supreme court is equivalent to a positive declaration of congressional will that baseball should not only be unregulated federally but should also be free of state control. The acceptance of federal pre-emption under the circumstances of this case appears to be contrary to the past pronouncements of this court. In the recent case of *Chicago & N. W. R. Co. v. LaFollette* (1965), 27 Wis. (2d) 505, 512, 135 N. W. (2d) 269, we restated the rule which this court has long followed and which follows the decisions of the United States supreme court on the subject—that "before pre-emption will be found to exist, that intention of Congress must be clearly manifested."

In *Welch Co. v. New Hampshire* (1939), 306 U. S. 79,

85, 59 Sup. Ct. 438, 83 L. Ed. 500, the United States supreme court stated:

> " 'In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution . . . it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested.' "

That being the standard where specific legislation is involved, can there be a less rigorous criterion for the pre-emption of state police power where our only clue to congressional intent is nonaction? Can we conclude that congressional silence amounts to a manifestation that it is the national policy and the congressional will that baseball free of *all* regulation? We think not.* The majority opinion subscribes to the view "that the silenec of Congress in this context sufficiently amounts to an expression of such policy." No authority is quoted for this proposition, nor does a review of the briefs of the appellants reveal the citation of any prior adjudications which hold that we may predicate a policy of pre-emption upon silence. The most that possibly can be concluded from the failure of Congress to enact some regulation of baseball is that it reveals a congressional complacency with its own policy of nonaction and inertia. Even that is a strained interpretation since the record shows that there have been several unsuccessful attempts to enact congressional regulation which would

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*See Federal Trade Commission v. Dean Foods Company, 34 U. S. Law Week 4495 (June 13, 1966); Helvering v. Hallock (1940), 309 U. S. 106, 119-121, 60 Sup. Ct. 444, 84 L. Ed. 604.

clarify the attitude of Congress toward the regulation of organized baseball.

The supreme court of the United States in *Federal Baseball Club v. National League* (1922), 259 U. S. 200, 42 Sup. Ct. 465, 66 L. Ed. 898, held that baseball was not in interstate commerce and, therefore, not subject to the federal antitrust laws. Subsequent decisions make it abundantly clear that the rationale of *Federal Baseball* is invalid and that, in fact, baseball is in interstate commerce. However, the United States supreme court, relying upon *stare decisis*, has continued to extend the umbrella of protection from *federal* antitrust legislation over the baseball business. Congressional inaction can be construed as acquiescence in the court's interpretation, but this in no way constitutes an expression of intent that Congress shall exclusively occupy the field or that there shall be no control whatsoever. As was pointed out in *Graves v. N. Y. ex rel. O'Keefe* (1939), 306 U. S. 466, fn. 1, 479, 59 Sup. Ct. 595, 83 L. Ed. 927:

> "The failure of Congress to regulate interstate commerce has generally been taken to signify a Congressional purpose to leave undisturbed the authority of the states to make regulations affecting the commerce in matters of peculiarly local concern, but to withhold from them authority to make regulations affecting those phases of it which, because of the need of a national uniformity, demand that their regulation, if any, be prescribed by a single authority."

The majority opinion, moreover, hypothesizes a conflict between state and federal legislation where none ex-

ists in fact. In *Huron Cement v. Detroit* (1960), 362 U. S. 440, 443, 80 Sup. Ct. 813, 4 L. Ed. (2d) 852, the court said:

> " 'The intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State.' "

The United States supreme court in the same case referred to its "teaching . . . which enjoin seeking out conflicts between state and federal regulation where none clearly exists." *Huron Cement v. Detroit, supra,* page 446.

The majority opinion by construing the silence of Congress as conflicting with state's policy as expressed in its antitrust laws appears to disregard this admonition.

It seems clear that the proposition that the majority asserts is a novel one without prior foundation in constitutional law and is an express repudiation of the doctrine that there shall be pre-emption or a superseding of state regulations only by express legislation.

A more difficult problem is presented by the second facet or alternate basis of the majority's opinion. The majority states the proposition, "that the structure of the leagues, their decisions as to their own membership, location of franchises, and things of that nature, require uniformity of regulation, and since organized baseball operates widely in interstate commerce, the regulation, if there

is to be any, must be prescribed by Congress." It is generally stated:

> "Absent congressional action, the familiar test is that of uniformity versus locality: if a case falls within an area in commerce thought to demand a uniform national rule, state action is struck down. If the activity is one of predominantly local interest, state action is sustained. More accurately, the question is whether the state interest is outweighed by a national interest in the unhampered operation of interstate commerce." *California v. Zook* (1949), 336 U. S. 725, 728, 69 Sup. Ct. 841, 93 L. Ed. 1005.

This argument partakes of the theory that irrespective of congressional action or inaction, there is a certain sphere of interstate commerce within which a state may not operate at all. This area is one in which congressional intent is immaterial. Our federal system envisages the free flow of commerce, in the various meanings of that phrase, from one state to another unhampered by state action. Hence, if our federal political union is to thrive, certain aspects of interstate commerce cannot be interfered with, irrespective of congressional will or the claims of state police power. The majority opinion, as an alternative to the argument based on the manifestation of congressional will, follows this line of reasoning. The majority's approach, however, overlooks the recognized necessity of balancing national interest versus local interest as such interests juxtaposed in a given situation. As the United States supreme court pointed out in *California v. Thompson* (1941), 313 U. S. 109, 113, 61 Sup. Ct. 930, 85 L. Ed. 1219:

"The Commerce Clause, in conferring on Congress power to regulate commerce, did not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress has not exercised its power, even though the regulation affects interstate commerce."

That case cites numerous instances where the United States supreme court has upheld the exercise of state police power which clearly regulated some phase of interstate commerce. In the same opinion, the United States supreme court, speaking through Mr. Justice Stone, stated:

"It has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause. Notwithstanding the Commerce Clause, such regulation in the absence of Congressional action has, for the most part, been left to the states by the decisions of this Court, subject only to other applicable constitutional restraints." *California v. Thompson, supra,* p. 113.

The court concluded its discussion upholding a California police regulation by stating:

"In any case, until Congress undertakes its regulation, we can find no adequate basis for saying that

the Constitution, interpreted as a working instrument of government, has foreclosed regulation . . . by local authority."

The majority opinion points out the cavalier disregard of either law or reasonableness in the exercise of the baseball monopoly. We cannot conclude that the state is less able to resist this treatment of its legitimate interests by organized baseball than it is to prevent the entrance into its boundaries of contagious disease, although such disease is carried in interstate commerce. *Morgan's Steamship Company v. Louisiana* (1886), 118 U. S. 455, 6 Sup. Ct. 1114, 30 L. Ed. 237; *Compagnie Franchise v. Board of Health* (1902), 186 U. S. 380, 22 Sup. Ct. 811, 46 L. Ed. 1209. The record, as the majority indicates, strongly suggests that the defendant gave little heed to the Milwaukee community and to the injury which the move of the Braves out of Wisconsin would cause. Organized baseball is engaged in a boycott of Wisconsin business. The argument is posed that, although this injury be admitted, for the State of Wisconsin by its decree either to order the Braves team to stay here or to direct the National League to furnish an expansion team would burden interstate commerce, which, if it is to be burdened at all, can be done uniformly only by congressional action. It appears, however, that in view of the particular circumstances of this case, the paramount interest in regulating baseball is a Wisconsin interest, not a national interest. As stated in *California v. Thompson, supra*, page 115:

"Fraudulent or unconscionable conduct of those so engaged which is injurious to their patrons, is pecul-

iarly a subject of local concern and the appropriate subject of local regulation."

The National League and the Milwaukee Braves, Inc., saw fit to come within the jurisdiction of the Wisconsin courts, and for 13 years continued to play its home games in Milwaukee. It is not contradicted that as a result of the Braves' presence in Wisconsin, transportation facilities were expanded, municipal services were augmented, and industries of various type were created or expanded to support organized baseball in Milwaukee. The record shows, and the findings of the court are not disputed by the majority, that the National League baseball team was a profitable enterprise during the time that it was located in Wisconsin. Admitting that the order of the trial court to either return the Braves to Milwaukee or, in the alternative, have the National League furnish an expansion team within a reasonable length of time is to prevent a boycott of Wisconsin commerce, does that factor *ipso facto* constitute a burden on interstate commerce?

We think not. It is well settled that a state may exercise its police powers through such devices as the antitrust laws even though an incidental benefit may be to local commerce, providing that the law or its operation do not discriminate against interstate commerce or disrupt its required uniformity. *Huron Cement Co. v. Detroit* (1960), 362 U. S. 440, 448, 80 Sup. Ct. 813, 4 L. Ed. (2d) 852; *Head v. New Mexico Board* (1963), 374 U. S. 424, 83 Sup. Ct. 1759, 10 L. Ed. (2d) 983; *Cooley v. Board of Wardens* (1851), 53 U. S. (12 Howard) 299, 13 L. Ed. 996. There is no intimation by the appellant that the Wisconsin anti-

trust laws are applied in a discriminatory manner. It is equally clear that state antitrust laws can be enforced concurrently with, or in the absence of, federal regulation. *Watson v. Buck* (1941), 313 U. S. 387, 403, 61 Sup. Ct. 962, 85 L. Ed. 1416; The Commerce Clause and State Antitrust Regulation, Columbia Law Review (1961), p. 1469. Here, the Wisconsin antitrust laws concededly are being applied in exactly the same fashion that they would be applied to a wholly domestic corporation.

Clearly, the order of the trial court imposes some restrictions upon baseball's conduct in interstate commerce, but this dissenting opinion concludes that the valid interests of the State of Wisconsin, which are entitled to protection, outweigh the restrictive effect on interstate commerce that might result from the enforcement of Wisconsin's laws. Under such circumstances, the pre-emption argument or overriding-national-interest argument should be rejected and the state law sustained. See Constitutional Law, West Publishing Company (1963), 310, 319, reprinting Pre-emption as a Preferential Gound: A New Canon of Construction, 12 Stanford Law Review 208 (1959).

The violation of Wisconsin antitrust laws is apparent and the wrong that has been done to Wisconsin and its citizens is substantial. As the trial court determined in its findings, the unbridled exercise of monopoly by the Braves baseball team will deprive the public and various businesses located in Milwaukee of substantial economic and recreational benefits,[1] and as the court concluded as

[1]One witness testified that the annual economic benefit to Milwaukee amounted to $18,000,000.

a matter of law the conduct of the Braves ball club constitutes a violation of Wisconsin's antitrust statutes. The majority in arriving at its conclusion concede the antitrust violation, if the application of the statute is not otherwise barred.

The trial court's order directs that these wrongs shall be rectified by providing, in the alternative, that the baseball team shall either return to Milwaukee or that an expansion team be furnished by the league.

This would not appear to be an onerous burden upon baseball. The direction is merely to return to Milwaukee, where operations have been profitable and where, as a matter of fact, the trial court has found that continued profitable operations are feasible. The trial court also found, as a matter of fact, that expansion of the league is feasible. What the trial court has directed is not the curtailment or burdening of interstate commerce, but its emancipation from the monopolistic practices of baseball. It has directed that baseball, in its dealings with a community where it has prospered, for 13 years, act reasonably. All that is prohibited is the *unreasonable* use of monopoly power. It can hardly be argued that it is in the national interest to preserve a monopoly that may with impunity flout the laws of the State of Wisconsin and injure its citizens and economy. The appellant argues that the affirmance of the trial court's ruling will undermine the very essence of organized baseball. It may well be that baseball as presently operated, above the law, should in some respects be modified, but we conclude that organized baseball underestimates the viability of the national pastime and exaggerates the

potential state control that can emanate from an affirmance of the trial court's order. Only in the unique case, as the facts reveal here, where a baseball club in collusion with others unreasonably determines to boycott *in toto* an area previously served would the relief sought by the State of Wisconsin be possible. It is not contended that an antitrust or other regulatory action could be brought where there had not been a prior offering of regular baseball exhibitions.

We are not convinced that for baseball to be successful it must be unlawful. Admittedly, the judgment of the Braves' management (whose wisdom was severely challenged in the course of trial) to leave Milwaukee or for the league to totally abandon the area would be superseded by the affirmance of the order of the trial court. This, however, is a usual result where relief is sought under an antitrust statute. Management decisions are superseded if the compelling public interest so requires. The balance that must be struck in determining whether a state policy burdens interstate commerce is not dependent upon the effect it may have upon the particular item of commerce, but rather upon its impact on the national interest in preserving that commerce in its unregulated form.[2] It is difficult to see that any national interest is served by preserving a flow of commerce that at will violates the laws of one of the states and the legitimate interests of its citizens.

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[2]**Parker v. Brown** (1943), 317 U. S. 341, 362, 63 Sup. Ct. 307, 87 L. Ed. 315.

The fact that Congress has not acted would appear to be persuasive reason for the state to act. As pointed out in *Parker v. Brown* (1943), 317 U. S. 341, 362, 63 Sup. Ct. 307, 87 L. Ed. 315, state regulations of interstate commerce are to be upheld "because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, *may never be adequately dealt with by Congress.*" (Emphasis supplied.)

Baseball has heretofore successfully evaded all control. In *Federal Baseball, supra,* it contended, and successfully persuaded the United States supreme court, that it was purely in intrastate commerce and therefore immune from federal regulation. By a process of legal ossification it manages to preserve this immunity, while at the same time it asserts that it is in interstate commerce and therefore immune from state control. We are unwilling to ascribe to our legal system the impotency that the representatives of baseball would confer upon it.

The record shows that the Braves organization is no innocent that that has unexpectedly run afoul of an unreasonable state's efforts to preserve its share of a monopoly. The record is rife with evidence that the corporation acted surreptiously and deceitfully in an effort to prevent a timely exercise of Wisconsin's jurisdiction. The officers of the club represented that no change in location was contemplated when, in fact, the negotiations for that change were substantially complete. The contract with Atlanta con-

tained an exculpatory clause allowing the team to terminate its contract with Atlanta if litigation should force it to remain in Milwaukee. It is apparent that the baseball club contemplated the likelihood of being called to task for its conduct. The defendants have not sustained the burden of showing that Wisconsin's reasonable enforcement of its antitrust law constituted a prohibited burden upon interstate commerce.

It is difficult to see what national interest is preserved by immunizing this organization from the consequences of its violation of state law. Where, as here, the Congress has failed to act to protect the states from monopolistic predators, it is apparent that in the balance the salutary effect of law enforcement upon local welfare outweighs any spurious national interest that allegedly exists in preserving an unlawful interstate conspiracy that claims freedom from all legal restraints and sanctions.

We would affirm.

APPENDIX B

MEMORANDUM DECISION OF TRIAL JUDGE IN CIRCUIT COURT MILWAUKEE COUNTY

(Formal Parts Omitted)

On March 18, 1953, the other clubs of the National League unanimously consented to the transfer of the Braves Baseball Club from Boston (a two-league city) to Milwaukee. The club played its opening game at Milwaukee on April 14th, 1953; during the ensuing 12 years (1953 to 1964, both inclusive) played before a home attendance of 18,996,059, an annual average of 1,583,000.

On October 21st, 1964, the club, at a special meeting of its Board of Directors, at Chicago, Illinois, voted to request the National League for permission to transfer the franchise of the club from Milwaukee, Wisconsin, to Atlanta, Georgia (Exhibit No. 8), and on November 7th, 1964, the other nine constituent clubs comprising the National League, at a special meeting of the League, at Phoenix, Arizona, unanimously authorized the Milwaukee club to transfer the location of the club to Atlanta, effective with the 1966 season. (Exhibit No. 12)* The Braves' contract

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*The club had requested consent to remove effective with the completion of the 1964 baseball season, which would permit the performance of its 1965 home schedule at Atlanta, Georgia. The County of Milwaukee commenced an action in the Circuit Court of Milwaukee County for the injunctive remedy requiring the Braves to play its 1965 home schedule in Milwaukee County Stadium. (Circuit Court Case No. 325-682) The League required the Braves to play its 1965 home schedule in Milwaukee. (Exhibit 12) The Braves thereupon agreed to the entry of judgment and performed its 1965 home schedule in Milwaukee.

(the lease) with Milwaukee County did not expire until December 31st, 1965. (Exhibit No. 119)

The plaintiff brings this action against the defendants for alleged violation of the State's Antitrust laws, seeking both statutory forfeiture and injunctive relief. The removal of the Braves and the shutting down of major league baseball in Milwaukee is the basis of the suit.

The Complaint

The defendant, National League of Professional Baseball Clubs (also referred to as National League) is an unincorporated association having as its purpose of the promotion of the interests of the other ten defendants, all incorporated (also referred to as the "club"), who are franchised members thereof and who are sued individually and as representatives of the National League and of the class consisting of the members of the National League.

Professional baseball clubs are organized into leagues composed of member clubs, each of which has a geographical location in a different city (and with only several exceptions in a different state) which is called its "home." Each club maintains a team of skilled players under contract to play for the club. Each club plays games for ex-

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Regretfully, but as was to be expected, a disappointed and disillusioned public gave little support to the club's home games in 1965. The home attendance was 555,884, exclusive of "no shows." Home attendance in 1964 was 910,911, exclusive of some 80,000 "no shows." The 1965 schedule of home games is commonly referred to in the record as the "lame duck" season and is considered as having no comparative relevancy to any issue in the case. (Dr. Clark referred to the situtation as a non-recurring factor.)

hibition with each of the other member clubs in its league during the baseball season, each club playing approximately one-half of its games in its home ball park.

The defendant, National League, and the American League are designated the major leagues. These leagues are composed of ten members each. All other leagues in professional baseball are designated as minor leagues and teams maintained by the clubs which are members of the minor leagues are designated as minor league teams. Each minor league is a member of the National Association of Professional Baseball Leagues. All of the baseball clubs in organized professional baseball are either members of the defendant, National League, the American League or a league which is a member of the National Association of Professional Baseball Leagues.

Jurisdiction and venue are based upon the defendants' alleged continuing contract, combination or conspiracy in unreasonable restraint of trade both within and without the State of Wisconsin in violation of section 133.01, Stats., and of the common law and that substantial parts of such violation have occurred in and effect commerce within Milwaukee County. (par. 1)

With respect to the parties the complaint alleges that the suit is brought by the State of Wisconsin in its sovereign and governmental capacity with the Attorney General and his assistants and the Corporation Counsel acting pursuant to sections 133.02, 14.525 and related sections of the state's statutes (par. 2); that all defendant clubs are incorporated and have their principal place of business (ex-

cept defendant Milwaukee Braves, Inc.) in jurisdictions other than Wisconsin. (Par. 3)

It is alleged that the trade and commerce involved in the suit is the organizing and promoting of professional baseball games; the complaint sets forth the organization of the leagues and the organization of play, alleges that the Braves hold a franchise from the National League to operate a professional Major League baseball club in the City of Milwaukee, Milwaukee County; that the defendant Braves own the exclusive rights to the services of approximately forty Major League professional baseball players, together with the exclusive right to assign and renew each such contract and that they also own the conditional right to the services of a large number of professional players not in the Major Leagues; that the defendant Braves play approximately 162 baseball games each year, plus certain exhibition games, approximately one-half of the league games and some of the exhibition games in Milwaukee County Stadium, the home stadium of said defendant; over the period of 1960-1964, the annual receipts for sales of tickets for such home games exceeded one million dollars; that in consideration of large sums of money paid to them, the various clubs and leagues, including defendants, enter into contracts permitting radio broadcasting and telecasting of baseball games; that the clubs cooperate with national networks in the production and broadcasting of such games for national broadcasting, that many of the games played by the defendant Braves are broadcast and telecast in the County of Milwaukee and in the state and throughout the United States, that the sale of such rights to such produc-

tion and broadcast and telecast is a substantial business of the clubs and the leagues, that over the period of 1960-1964 the defendant Braves sold such rights for sums in excess of $3.2 millions; that Major League baseball is the only class of professional baseball which attracts widespread public interest which is regularly publicized in the sporting pages of newspapers and magazines and attracts network television and radio sponsorship, that Major League baseball has a particular demand and peculiar qualities different from Minor League or college baseball, that the caliber of both individual and team play in Major League professional baseball is far superior to that of minor league or college baseball and only a small number of minor league players or college players are able to obtain positions on Major League professional baseball teams; that the defendant Braves are engaged in the business of buying and selling food, beverages and other goods for profit at Milwaukee County Stadium to the public in attendance at baseball and football exhibitions and other public functions, that over the period 1960-1964 the defendant Braves' annual receipts for such sales exceeded $300,000; that the defendant Braves, the radio and television stations which broadcast their games, the newspapers which report them and the suppliers of various kinds and advertisers who cater to the wants and needs of their audiences are all in competition with other business of a similar nature. (par. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14)

In connection with the offense charged, under IV of the complaint, it is alleged that professional baseball is organized by a series of interrelated agreements among the mem-

ber teams of the National and American Leagues, between the two Major Leagues, among the Major Leagues and an association of minor leagues, and among the minor leagues, that through these agreements substantially all relationships among the various leagues, teams, owners, agents and players are regulated (par. 15); that the defendant Braves and the other clubs have subscribed and agreed to be bound by the constitution and rules of the League, they being the only members of the National League and that no other person may be admitted to membership in the League except upon the unanimous consent of the present clubs (par. 16); that the Braves, the other clubs, and the League and persons acting in concert with them, are parties to the "Major League Agreement" (par. 17); that the constitution of the League and the Major League Agreement create in the Braves, the other clubs and the League, and persons acting in concert with them (a) a monopoly in the right to employ the services of all present and future professional baseball players of Major League quality, (b) the absolute power to determine the time and place of exhibition and broadcast of all Major League games (par. 18); that "in addition, the constitution of the League and the agreement give to the Braves, the other clubs and the League, and persons acting in concert with them the absolute and unrestricted monopoly power: (a) to prohibit any Major League professional baseball player from contracting to perform or performing as a player during his entire career except on precise terms and at places, dictated and determined by them; (b) to designate and limit the territory and places where Major League professional baseball games

may be performed and exhibited in public and the places from which and to which Major League professional baseball games may be broadcast by radio and television; (c) to bar from any city, county, or state, absolutely, or except upon such terms and conditions and at such times and places as may be dictated by them, any performance by any Major League professional baseball player or club; (d) to prescribe elaborate rules and regulations governing all relationships among the various baseball leagues, teams, owners, agents and players, making the Commissioner of Baseball the final arbitrator of disputes involving baseball; to enforce such decisions by fines, suspensions, and other penalties, and to bar judicial review of any decision of the Commissioner (par. 19); that these agreements restrain competition by skilled professional baseball players for employment, prevent persons seeking to organize or operate Major League professional baseball clubs from engaging the services of such players, and establish and maintain in the Braves, the other clubs and the League, and persons acting in concert with them, a monopoly of the right to use the services of such players and of the business of owning and operating Major League professional baseball clubs (par. 20); that over a period of many years, the clubs and the League, together with persons acting in concert with them, have achieved adherence to said agreements of all persons engaged in professional baseball by the use (and threat of use) of practices such as refusals to deal with other baseball clubs and leagues not parties to said agreements, and by excluding from employment as a player any player who failed or refused to submit to or be bound by

the terms of said agreements; and they have thereby protected their monopoly of and their agreement to monopolize the right to the services of all professional baseball players." (par. 21)

The defendants are charged with unlawful acts in V of the complaint (par. 22, 23) alleging as follows:

"22. Pursuant to a combination and conspiracy and agreement to monopolize, and to protect and extend their monopoly and to restrain and eliminate competition with respect to radio and television rights and other commerce within the State of Wisconsin and among the several states, the Braves, the other clubs, the League and persons acting in concert with them have agreed to an illegal plan:

"(a) to terminate the playing and exhibition of Major League baseball games by the Braves in Milwaukee;

"(b) to play and exhibit the Braves' home games in Atlanta, Georgia, for at least twenty-five years;

"(c) to prohibit any successor to the Braves from organizing and operating a Major League baseball team in Milwaukee and from playing Major League baseball games using Milwaukee as 'home' after the intended departure of the Braves from Milwaukee;

"(d) to prohibit Milwaukee Brewers Baseball Club, Inc., Milwaukee County, or any other person or persons willing and able to do so, from contracting for the services of any Major League baseball players to play Major League baseball in Milwaukee; and

"(e) to restrain and prevent Milwaukee Brewers Baseball Club, Inc., Milwaukee County, or any other person who may wish to organize and operate a Major League baseball team with Milwaukee as its 'home' from scheduling or playing a Major League baseball game with any club in the League;

"(f) to fail properly to promote interest in attendance at Braves' home games during 1965, to disparage Milwaukee as a city where Major League baseball can be successfully and profitably exhibited by a home team, and thereby to justify their claim of bona fide business reasons for quitting Milwaukee.

"23. In pursuance of the aforesaid combination, conspiracy and agreement to monopolize, and in order to carry out the aforesaid illegal plan, the Braves have entered into, and the other clubs and League, and persons acting in concert with them, have approved, an illegal and void contract with the Fulton County (Georgia) Stadium Authority obligating the Braves to play all of their League home games in the Fulton County Stadium, for a period of twenty-five years."

The effects of the contract, combination, conspiracy and use of monopoly power are alleged in VI of the complaint. There it is alleged that by the foregoing acts "the Braves, the other clubs and the League, and persons acting in concert with them, intend to and will, unless enjoined and restrained, unlawfully: (a) terminate, restrain and prevent the exhibition of Major League professional baseball games in the City of Milwaukee, the County of Milwaukee, and

the State of Wisconsin; (b) restrain and prevent any individual Major League professional baseball player from performing in any Major League professional baseball game in the City of Milwaukee, the County of Milwaukee, and the State of Wisconsin; (c) fail and refuse to grant the application of the County of Milwaukee or of Milwaukee Brewers Baseball Club, Inc., to become a member of the League and prohibit Major League professional baseball players from negotiating with or accepting employment to play baseball for such County or corporation on any team whatsoever; (d) restrain and prevent any other person or persons willing and able to organize and operate a Major League professional baseball team in Milwaukee from negotiating or contracting with Major League players for their services or with other Major League teams for games; (e) terminate, restrain and prevent radio or television broadcasting of home professional Major League baseball games from the City of Milwaukee, the County of Milwaukee and the State of Wisconsin; (f) restrain and prevent the County of Milwaukee from operating the stadium for the purpose of public exhibitions of Major League professional baseball games, and restrain and prevent the transmission and narration of such games from the stadium by radio and television; (g) restrain and prevent the sale of Major League professional baseball games in the Milwaukee County Stadium of food, beverages and merchandise from within and without Wisconsin; (h) restrain the sales of commodities and services by restaurants, hotels, motels, taxis and other transportation facilities to spectators attending Major League professional baseball games at Milwaukee County

Stadium; (i) restrain and prevent the Milwaukee newspapers, radio stations, and television stations from printing, broadcasting and telecasting substantial material generated by the public exhibition of Major League professional baseball games in the City of Milwaukee, County of Milwaukee, or State of Wisconsin; (j) eliminate the competition between the Milwaukee County Stadium and Wrigley Field, and Comiskey Park, in Chicago, Illinois, for spectators at exhibitions of Major League professional baseball games; (k) eliminate competition between television stations in Milwaukee and television stations in Chicago, Illinois, for the market consisting of persons in Southern Wisconsin and Northern Illinois who view telecasts of Major League professional baseball games; (1) play and permit the playing of all of the Braves' home league games for twenty-five years in the Fulton County Stadium, and thereby prevent Milwaukee and other cities desiring Major League baseball home teams, from competing with Atlanta for the Braves. (par. 24)

In part VII of the complaint it is alleged that "If the defendants are not restrained and enjoined from carrying out their illegal plan, Milwaukee County will be irreparably injured in that: (a) it will be prohibited from securing for the stadium a tenant comparable to the tenant of which it is being deprived; (b) it will be the owner of a substantial facility for exhibition of Major League profession baseball games and will be unable to obtain such games for exhibition; (c) the plaintiff and its various subdivisions will be deprived of substantial tax revenues presently levied upon the sales of food, beverages and souvenirs and collected on behalf of the plaintiff for the benefit of all the

citizens of the state" (par. 25) that the public within commuting range of the stadium will "be denied the economic and recreational benefits of free competition in the business of Major League baseball, in violation of section 133.01, Stats., and the common law." (par. 26)

Answer of Defendant, Milwaukee Braves, Inc. (alleged to be also known as Atlanta Braves, Inc., except in the State of Wisconsin)

Defendant denies generally the allegations of Paragraph 1 of the complaint, that defendants have engaged in a continuing contract, combination or conspiracy in unreasoanble restraint of trade both within and without the State of Wisconsin in violation of section 133.01, Stats., and of the common law and that substantial parts of such violations have occurred in and affect commerce within Milwaukee County.

Defendant denies generally the allegations of Paragraph 2 of the complaint that the case is brought by the State of Wisconsin in its sovereign and governmental capacity, with the Attorney General and his assistants and the Corporation Counsel acting pursuant to the provisions of section 133.02, 14.525, and related sections of the statutes.

Answering Paragraphs 3 and 4 of the complaint, defendant denies specifically that its principal place of business is in Milwaukee, Wisconsin, and alleges that it is in Atlanta, Georgia; denies generally that each of the defendants, members of the National League, is fairly representa-

tive of the National League and of the members of the National League and will fairly insure their adequate representation.

Answering the 5th paragraph of the complaint, the defendant denies specifically that the trade and commerce involved in this suit is the organizing and promoting of professional baseball games, including exhibition games, regularly scheduled season games, play-offs, all-star games and world series games.

Answering Paragraph 6 of the complaint, defendant alleges that each Major League is composed of ten members each of which employs highly skilled players; denies generally that all of the other leagues in professional baseball are designated as minor leagues and their teams are designated as minor league teams, that each minor league is a member of the National Association of Professional Baseball Leagues, an unincorporated association, and that all of the baseball clubs in organized professional baseball are either members of the defendant, National League, or the American League, or of a league which is a member of the National Association of Professional Baseball Leagues.

Defendant specifically denies that the visiting club is paid 37½¢ on each paid admission, as alleged in the 7th paragraph of the complaint and states the fact to be that the visiting club is paid 27½¢ on each paid admission on each game played during the regular season.

Defendant admits the allegations of Paragraph 8 and in further answer thereto specifically alleges that the Braves' franchise from the League to operate a professional

Major League baseball club in the City of Milwaukee, County of Milwaukee, expired at the conclusion of the 1965 baseball season and that defendant holds a franchise from the National League, effective October 4th, 1965, to operate in Atlanta, Georgia, in 1966 and subsequent years.

Admitting specifically that it owns the exclusive rights to the services of approximately forty Major League professional baseball players as alleged in the 9th paragraph of the complaint, the defendant denies generally the allegation that it has an exclusive right to assign and renew each such contract.

In answer to the allegations of the 10th paragraph of the complaint, the defendant denies generally the allegation that over the period of 1960-1964, the Braves annual receipts for sales of tickets for home games exceeded one million dollars and in said respects specifically alleges that this defendant did not come into existence until November 15, 1962, and that it never has sold anywhere near one million tickets per season.

In answer to the 11th pargraph of the complaint, the defendant admits that it has entered into contracts with other persons not parties to the litigation permitting radio broadcasting of its home games and telecasting of occasional games.

The defendant denies generally all other allegations contained in Paragraph 11, viz, that the various clubs and leagues, including the defendants, enter into contracts permitting the radio and television broadcasting of Major League professional baseball games in consideration of the

payment to them of large sums of money, that the clubs cooperate with radio and national television networks in the production and broadcasting of such Major League professional baseball games for national network broadcasting, that many of the games played by the Braves are broadcast on radio and/or television in the County of Milwaukee, the State of Wisconsin, and throughout the United States, that the sale of the rights to such production, and broadcast of games by radio and television, is a substantial business of the clubs and the leagues and that over the period of 1960-1964 the Braves sold such rights for sums in excess of 3.2 million dollars. Specifically, the defendant denies that it, or to its knowledge any other defendant, engages in the business of broadcasting or telecasting and alleges that the sale of the rights to broadcast or televise baseball exhibitions is a mere incident to the lawful function of the clubs to conduct baseball exhibitions before live audiences.

That by way of general denial to the allegations of the 12th paragraph of the complaint the defendant Braves denies that Major League professional baseball constitutes a market separate and distinct from the exhibition of the minor league or college baseball contests and other sporting bouts, forms of public shows, spectacles and entertainment; that it is the only class of professional baseball which attracts wide-spread public interest which is regularly publicized in the sporting pages of newspapers and magazines and which attracts network television and radio sponsorship; that Major League Professional Baseball has a particular demand and peculiar qualities different from minor league baseball or from college baseball and that only a

small number of the most outstanding minor league players or college players are able to obtain positions on Major League professional baseball teams. The complaint alleges additionally that the caliber of both individual and team play in Major League professional baseball is far superior to that of minor league baseball or college baseball. This allegation is qualified by the defendant's admission that the caliber of individual and team play in Major League professional baseball is usually superior to that of minor league baseball or college baseball.

In answering Paragraph 13 of the complaint wherein it is alleged that the Braves are engaged in the business of buying and selling foods, beverages and other goods for profit at Milwaukee County Stadium to members of the general public and at all other public functions at the stadium and that over the period of 1960-1964, the Braves' annual receipts for such sales exceeded $300,000, the defendant denies and qualifies by its allegation that incidental to other events held in Milwaukee County Stadium since November, 1962, it has operated food and concessions at the stadium and that its annual receipts from such sales have exceeded $300,000 in each of the years 1963 and 1964.

In Paragraph 14 the plaintiff alleges that the Braves, the radio and TV stations which broadcast their games, the newspapers that report them and the suppliers of various kinds and advertisers who cater to the wants and needs of their audiences are all in competition with other businesses of a similar nature. In answering this paragraph of the complaint the defendant denies the allegations insofar as they apply to the Braves and alleges that it is without

information sufficient to form a belief as to the remaining allegations and therefore denies them.

In answer to the 15th paragraph of the complaint the defendant denies generally the allegations thereof, except that it admits agreements have been entered into among the members of the National League and among the members of the American League, between the Major Leagues, between the Major Leagues and the National Association of Professional Leagues (sometimes called the minor leagues) and among the members of said National Association.

The defendant admits the allegations of Paragraph 16 with the exception that it denies the allegation that no person other than the present members may be admitted to membership in the National League except upon the unanimous consent of the present clubs.

In Paragraph 17 of the complaint the plaintiff refers to the Major League Agreement "entered into in August 1, 1960, amending and continuing an agreement of January 12, 1921, as amended December 12, 1944, February 3, 1945, and November 1, 1946, and by its terms to continue in force until January 1, 1975." By admission and qualification the defendant alleges that the Braves, the other members of the National League, the National League and the American League and the members thereof are parties to the Major League Agreement.

The defendant denies generally the allegations of Paragraphs 18, 19, 20, 21, 22, 23, 24, 25 and 26 of the complaint.

Further answering the complaint, the defendant Braves pleads affirmatively:

1. That the court lacks jurisdiction over the subject matter on the following alleged grounds:

(a) That the activities of organized baseball complained of are not within the scope of the Wisconsin Antitrust Laws and do not violate the common law of the state;

(b) That the action constitutes an attempt to regulate and impose an unreasonable burden upon interstate commerce in violation of the Federal Constitution;

(c) That the business of organized baseball is predominantly national in character and requires uniformity of regulation which alone can be provided by Congress; that the attempt by the State of Wisconsin to regulate organized baseball violates the Federal Constitution;

(d) That the action seeks an extraterritorial application of the state's laws;

(e) That the Supreme Court of the United States had determined that organized baseball is not subject to Federal or State antitrust laws with respect to activities of the type complained of;

(f) That the complaint seeks to have the court assume jurisdiction over alleged restraints of interstate commerce, which subject matter is within the exclusive jurisdiction of Federal Courts under the Sherman and Clayton Acts;

(g) That the action and the relief requested constitutes an attempt to deprive the defendant of its property without due process;

(h) That the action attempts to compel the defendant to remain in the State for the purpose of violating the laws of the State in violation of the Federal Constitution;

(i) That the action is in effect an attempt to exercise the right of eminent domain on behalf of private parties without any guarantee of just compensation in violation of the Federal Constitution;

(j) That the action attempts to compel the defendant to continue to do business in the State of Wisconsin in violation of the Federal Constitution;

(k) That the relief sought by the State of Wisconsin which would compel the defendant to remain in the State is not a form of relief specified in the laws of the State;

2. That the plaintiff has not the legal capacity to sue, on the following alleged grounds:

(a) That the action seeks relief in the complaint which is not granted by the state statutes or the common law;

(b) That the relief is sought for the benefit of Milwaukee County, Milwaukee Brewers Baseball, Inc. or some private person not named in the complaint and, therefore, the State of Wisconsin is not the real party in interest;

(c) That the Attorney General has no standing to sue on behalf of the State under the common law of the State;

3. That there is a defect of parties plaintiff on the alleged ground the County of Milwaukee and Milwaukee Braves (corrected to Brewers) Baseball, Inc., have not joined in this action;

4. That there is a defect in parties defendant on the following alleged grounds:

(a) That the City of Atlanta and Fulton County Recreation Authority, referred to in paragraph 23 of the complaint, is an indispensable party defendant to this action which has not been joined; that final disposition of this action in the absence of the Authority would leave the controversy in a condition wholly inconsistent with equity and good conscience;

(b) That all other persons with whom the answering defendant has entered into contracts in Atlanta, Georgia, in connection with its preparation to exhibit Major League baseball games in said city are also indispensable parties to the action which have not been joined;

5. That to grant the relief prayed against the defendant would nullify existing contract rights under its lease with the City of Atlanta and Fulton County Recreation Authority in violation of the Fourteenth Amendment of the Federal Constitution;

6. That the defendant has the legal obligation to play all of its regularly scheduled home games beginning with the year 1966 in the stadium owned and operated by the City of Atlanta and Fulton County Recreation Authority and cannot lawfully be compelled to play any of said games elsewhere;

7. That the defendant has ceased doing business in Wisconsin and has duly filed an application for withdrawal and final report pursuant to the statutes and cannot be compelled to resume doing business in the State in violation of law;

8. That the court lacks jurisdiction either to make a new lease for the defendant or to compel the defendant to enter into a new lease with Milwaukee County for the County Stadium or to enter into the numerous other contracts that would have to be executed in order to exhibit Major League baseball games in the stadium;

9. Upon information and belief that the filing of the complaint by plaintiff is part of a plan to harass the defendants by multiple lawsuits in order to coerce the defendant Braves to remain in Milwaukee or to cause the creation of a new Milwaukee franchise;

10. That several causes of action have been improperly united;

11. That the complaint does not state facts sufficient to constitute a cause of action;

12. That the action attempts to deprive defendant of rights guaranteed to it by the Wisconsin Constitution.

Answer of Defendants Chicago National League Ball Club, Cincinnati Reds, Inc., Houston Sports Association, Inc., Los Angeles Dodgers, Inc., Metropolitan Baseball Club, Inc., Philadelphia National League Club, St. Louis National Baseball Club, Inc., Pittsburgh Athletic Co., Inc., National Exhibition Co., Inc., and National League of Professional Baseball Clubs

The answer of these defendants is identical to the answer of the defendant Braves with respect to Paragraphs 1, 3, 4, 5, 6, 7, 12, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 of the complaint.

In connection with Paragraph 2 of the complaint the defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations thereon.

The defendants deny the allegations of the first sentence of Paragraph 8 of the complaint except admitting that the Braves held a franchise from the National League to operate a Professional Major League Baseball Club in Milwaukee during and prior to the 1965 baseball season; and defendants allege that the Braves hold a franchise from the National League, effective October 4th, 1965, to operate in Atlanta, Georgia, in 1966, and subsequent years. The remainder of the allegations of Paragraph 8 are admitted.

Answering Paragraph 9 of the complaint, the defendants deny knowledge or information sufficient to form a belief as to the truth thereof, except that they admit that a number of Major League professional baseball players have entered into contracts under which they perform

services for the Braves and reference is made to such contracts for the terms thereof.

The defendants admit the allegations of Paragraph 10 of the complaint insofar as they refer to the 1965 baseball season or prior thereto, except that they deny knowledge or information sufficient to form a belief as to the truth of the allegation that over the period of 1960-1964 the Braves' annual receipts for sales of tickets for such home games exceeded one million dollars.

In answer to the 11th paragraph of the complaint, each of the defendants denies the allegations of said paragraph insofar as they refer to it, except that each of the defendants (except the National League) admits that it has sold to other rights to broadcast by radio or television descriptions and picturizations of some games played by its teams and each denies knowledge or information sufficient to form a belief as to the truth of the allegation, insofar as they refer to other clubs and leagues.

The defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 13 and 14 of the complaint.

The defendants also plead eight affirmative defenses identical to those of the defendant Braves. They do not allege the allegations under subdivision (b) alleged as a ground under defendant Braves' fourth defense, nor plead the 5th, 6th, 7th and 8th affirmative defenses alleged and pleaded in the defendant Braves' answer.

The Statutes

Section 133.01 (1) of the Wisconsin Statutes (1963) provides in part:

> (Sentence 1) "Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal."
>
> (Sentence 2) "Every combination, conspiracy, * * * or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, to be produced or sold therein or constituting a subject of trade or commerce therein * * * is hereby declared an illegal restraint of trade."
>
> (Sentence 3) "Every person, corporation, * * * association who shall * * * combine or conspire with any other person, corporation * * * association * * * to monopolize or attempt to monopolize any part of the trade or commerce in this state shall forfeit for each such offense not less than $100 nor more than $5,000."

Section 133.02, Stats., authorizes the Circuit Courts to "prevent or restrain, by injunction or otherwise, the formation of any such contract or combination or the execution of the purposes thereof."

The first and third sentences of Section 133.01 were modeled after the Sherman Act and were first enacted in 1893. In *Pulpwood Co. v. Green Bay P. & F. Co.*, 157 Wis. 604, 625, 147 N. W. 1058 (1949), it was clearly indicated that since the statute (there section 1747 (e), Stats., the predecessor of the monopolization provision of section 133.01

(1)), is a copy of the Federal Statute (Sherman Act), it should receive the same interpretation and that Wisconsin's courts should be governed by Federal precedents. In *State v. Lewis and Leidersdorf Co.*, 201 Wis. 543, 549, 230 N. W. 692 (1930), the Supreme Court reaffirmed what was pointed out in the *Pulpwood case* decision "that section 133.01 is a mere re-enactment of the first two sections of the Sherman Antitrust Act, with application to intrastate as distinguished from interstate transactions, and that its construction is ruled by the Federal decisions construing the Federal statute."* There the court cites cases decided under Federal law as controlling upon the question of injury to intrastate commerce under the Wisconsin Antitrust law.

The plaintiff maintains that it has sustained its burden of proof and that it is established in the record that the defendants have violated the state law in at least four respects:

(1) The defendants are engaged in a group boycott and concerted refusal to deal which illegally restrains trade and commerce in Wisconsin.

(2) The defendants are a monopoly whose refusal to

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*Sherman Act. Section 1 provides in pertinent part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is * * * illegal."

Section 2 provides in pertinent part:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be guilty of a misdemeanor * * *."

deal for the purpose of extending and protecting the monopoly violates the antitrust laws.

(3) Even if the shutdown of baseball in Milwaukee was not intended to restrain trade, the decisions to transfer, not to expand, and to refuse to deal with the Milwaukee market would nevertheless be illegal efforts to protect and extend the power of an existing monopoly.

(4) Even if organized baseball is a self-regulating monopoly enjoying some kind of privileged position under the antitrust laws, the actions charged are nevertheless actionable restraints of trade and abuses of monopoly power.

The defendants assert that no case of this kind is to be found in the decisions. Concernedly the case is novel, but that does not mean that it can possess no legal merit. It presents unusual and perplexing questions which arise from a business which in modus operandi occupies an unusual position in the economy of the nation. The question is hardly whether an identical factual situation has been adjudicated but rather whether the facts presented here constitute a violation of the State's Antitrust laws within applicable principles of law.

1.) The term, organized baseball refers to "the many professional clubs and leagues which have subjected themselves to the jurisdiction of the Commissioner of Baseball and have contracted with one another to abide by certain rules and regulations."*

*Exhibit 7. Report of the Committee on Study of Monopoly Power. H. Res. 95, 82d Cong. (1951).

A fuller description is found in the Braves' prospectus of March, 1963 (Ex. 13) as follows:

> "Professional baseball is organized by a series of inter-related agreements among the member teams of the National and American Leagues, between the two Major Leagues, and among the minor leagues. Through these agreements substantially all relationships between the various leagues, teams, owners, agents and players are regulated. The Commissioner of Baseball is the final arbiter of all disputes involving baseball which are not finally determined, as the various agreements provide, by the Presidents or Executive Committees of the various leagues. The Commissioner can make final determinations, not subject to judicial review, pursuant to said agreements and such determinations are enforceable by fines, suspensions and other penalties."

Mr. Giles, President and Treasurer of the National League, referred to organized baseball as a "rather complex organization." He said he could best describe it "as an association of leagues playing professional baseball as distinguished from other leagues that are not playing professional baseball." He said it is an association of leagues, rules, agreements, regulations governing the inter-league and inter-club operations, and the Commissioner of Baseball, the Executive Council, the National Association president, the National Association Executive Committee. (R. 3540, 3541)

The claim that organized baseball is a monopoly is fully supported in the record.

Its economic control is achieved principally by agreements, viz., (a) the Constitution and Rules of the National League of Professional Baseball Clubs (as related to the National League, Ex. 3), (b) the National League Agreement to which each Major League and all member clubs are parties, and (c) the Major League Rules, promulgated pursuant to the agreement and binding upon both Leagues, their member clubs and players. (Blue Book, Ex. 1 for 1965, Ex. 2 for 1964)

(a) The number of competitors in organized baseball is limited. Article 3.1 of the National League Constitution provides that the League shall consist of not less than eight or more than ten members, each of which shall be a person conducting a professional baseball club located in (one of) ten designated cities. It also provides that the membership shall not be increased except by unanimous consent of all members. It is adidtionally provided that the location of an existing member club or clubs shall not be changed except by consent of three-fourths of all members.*

Article 3.2 of the National League Constitution provides that each member shall have an exclusive right, as among members, to play baseball games at the home club within the limits of the city in which the member's club is located. Rule 1 (c) of the Major League rules provides in material substance that the circuit of either Major Leagues may be changed to include any city in the circuit

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*See also Exhibit 4. Art. 3.15 of National League Constitution.

See testimony of Mr. Frick at page 583 of the record:

"Q So that what you are saying is that, unless Major League baseball, through its organization, actually opens up its franchise system, there is no sense in the city doing anything about it?

"A That's right."

of the other Major League with the consent of not less than three-fourths of the clubs in the other Major League.

(b) Article 1 of the Constitution deals with a uniform player's contract. It provides that all contracts between the clubs and players shall be upon the form prescribed by the Major League Executive Council* and that no club shall make a player contract different from the uniform player's contract, strike out or insert any language therein or otherwise amend the same without the written approval of the President.

Rule 3 (a) of the Major League rules provides that player contracts in the Major Leagues shall be in a single form prescribed by the Major League Executive Council and that no club shall make a contract different from the uniform contract or shall make a contract containing a non-reserve clause, except with the written approval of the Commissioner.

The Uniform Player's Contract appears in this record as Exhibit No. 5. The basic term of employment is one year. (Par. 1) It provides further that on or before January 15th of the year following the last playing season covered by the contract the club may tender to the player a contract for the term of that year and if prior to March

*The Major League Executive Council is provided for in Section 1 of Article 2 of the Major League Agreement and is composed of the Commissioner, the President of each of the Major Leagues, and two other members, one to be elected annually by each Major League; it provides further that the player representative of each League shall be entitled to attend all meetings of the Executive Council at which matters concerning the standard form of Player's Contract, or its provisions or regulations, or the Players' Pension Plan, are acted upon, and that each League player representative shall have the right to vote on such matters.

1st next succeeding said January 15th the player and the club have not agreed upon the terms of such contract, then on or before ten days after said March 1st, the club shall have the right by written notice to the player to renew the contract for the period of one year on the same terms, except that the amount payable to the player shall be such as the club shall fix in said notice, provided, however, that said amount, if fixed by a Major League club, shall be an amount payable at a rate not less than seventy-five (75) per cent of the rate stipulated for the preceding year. (Par. 10) The player has no right to refuse a renewal and during the life of the contract, or any renewal thereof, he may not play baseball otherwise than for the club except that he may participate in post-season games under conditions prescribed in the Major League Rules. (Par. 5) Rule 4-A (a) of the Major League Rules provides that on or before November 15th in each year, each Major League club shall transmit to the Commissioner and to its League President a list of not exceeding forty (40) active and eligible players whom the club desires to reserve for the ensuing season, and Rule 3 (g) prohibits any player from negotiating or dealing respecting employment, either present or prospective, with any club other than the club with which he is under contract, or by which he is reserved. In conformity with Rule 3 (a) the uniform contract provides that the player will abide by and comply with all of the provisions of the Major League Rules. (Par. 9) A player who fails, within ten days of the opening of his club's championship season, to report to, or contract with, his club, may be placed on the "restricted list" by the Commissioner. (Rule

15 (a)) A player who violates his contract or reservation may be placed on the "disqualified list" by the Commissioner. (Rule 15 (b)) In either event, he is not eligible to play for any Major League or National Association club until reinstated and shall not be tendered a Contract. (Rule 15 (e)) These contract provisions and rules constitute the reserve clause.*

The reserve clause is good for the whole life of the ball player.**

The effect of the Uniform Player's Contract and the Major League Rules by which the player agrees in his contract to be bound are:

(1) A player wishing to play professional baseball must sign a contract with a professional baseball club;

(2) The terms of that contract commit the player to being reserved for a period during a term for which he is not under contract and to an indefinite number of renewals of his contract;

(3) A player who fails to contract, who violates his contract or reservation may be placed on the restricted or

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*The reserve provision is described in the testimony of Commissioner Frick (then National League President) before the Subcommittee on the Study of Monopoly Power of the Committee on the Judiciary, pursuant to H. Res. 95, 82nd Congress (1951), as follows:

"Actually, the uniform player contracts, of major league and minor league, do not contain a particular clause which spells out the reserve provisions. The reserve clause may be said to comprise, first, the 'renewal clause' or option in the player contracts; second, the agreement in the player contract that club and player will abide by the major and major-minor league rules, and third, the reserve rule and the rule against tampering contained in the major and major-minor league rules."

**Testimony of Commissioner Frick before Subcommittee on the Study of Monopoly Power of the Committee on the Judiciary.

disqualified list and be ineligible to play for any league in organized baseball.

The practical operation of the reserve clause is made very clear by the following testimony of Mr. Frick, at page 576 of the record:

"Q And that reserve can continue so long as the baseball club that has the contract with the player desires to renew it?

"A Right. The player can, of course, quit baseball.

"Q If that player quits a baseball team, can he play baseball with any other baseball team that is governed by the League Rules or Agreements?

"A Not governed by the book.

"Q And that would literally eliminate him from what we know in this country as professional baseball, would it not, sir?

"A In this country, organized baseball. It doesn't prevent him from going to Japan or Venezuela or any other place, playing semi-pro or anything of that sort."

See also testimony of Mr. Giles. (R. 3606, 3607)

See also testimony of Prof. Andreano.* (R. 795, 796, 797)

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*Ralph L. Andreano. Associate Professor of Economics at the University of Wisconsin at Madison. He holds the following degrees in economics: B.A., Drury College, M.A., Washington University, Ph.D., Northwestern University. Prior to joining the University of Wisconsin faculty, he was an assistant professor at Earlham College and at the Harvard Business School. He is the author of several volumes, including "No Joy in Mudville" published in 1965 which includes an economic study of Major League baseball.

The interrelated rules and agreements created a monopoly of the market (territorial franchises) and over the raw material of the business (the right to the services of baseball players).

2.) From the very outset of the case the court has been met with a continuing challenge to its jurisdiction. Defendants assert that because of the unique nature of the baseball business, because of its national scope and character, it requires a uniform, national system of regulation, that its rules and regulations are necessary and reasonable to promote and preserve the equality of playing skills among member clubs of the League. Their jurisdictional objections rest on the federal decisions holding that organized professional baseball is not within the scope of the Sherman Antitrust Act,* and in progression they maintain that the business is not amenable to state law. If the defendants were right in their position, it would be dispositive of this action. For reasons previously considered, the court was and is of the opinion that the federal decisions are not conclusive of this case. The jurisdictional defenses have been previously submitted in extensive briefs and argued at great length, both on demurrer and motion for nonsuit. The court's decision on the demurrers will be made part of this decision by reference.** Under the position of the defendants, Organized Baseball has the absolute right to leave a community, (barring only an enforceable contractual com-

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*Federal Baseball Club of Baltimore v. National, 259 N. S. 200, 42 S. Ct. 465, 66 L. ed. 898 (1922); Toolson v. New York Yankees, Inc., 346 U. S. 356, 74 S. Ct. 78, 98 L. ed. 64 (1953); Radovich v. National Football League, 352 U. S. 445, 77 S. Ct. 390, 1 L. ed. 2d 456 (1957).

**January 24, 1966.

mitment), and the absolute right to refuse to provide a replacement club. It should be noted that in certain respects there is an independent control and regulation of the internal affairs of the business through its Commissioner, whom baseball has set apart in such independent capacity, but the questions involved in this litigation are matters over which the Commissioner has no jurisdiction.

Commissioner Ford C. Frick, although not speaking from a legal viewpoint, testified that he always held that baseball is an operation in a sense quasi public in nature (R. 509); he recognized the problem created by moving a franchise from a one-club town, "leaving that town without baseball," many years ago when he said to the owners of the Leagues that if the time came when they were moving a franchise from a one-club town, "they should consider it and reconsider it and then go back and look it over again before they make that move" (R. 587); and again sometime prior to the middle of July, 1964, when informed of the considered move to Atlanta, he informed Mr. Bartholomay and Mr. Reynolds that he felt for a long time that the transfer of a club that will leave a town barren of baseball is much more serious than transferring one club from a two-club city, and urged them to give the matter very careful thought and very careful study and then go back and restudy it and restudy it again before they did it. (R. 600) Mr. Frick did not believe that club owners had any responsibility "to lose money, to operate at a loss, to stay in a place where they can't get by for economic reasons." At the same time it was his opinion that such determination with respect to the economic situation should

not be made on the basis of the loss for any given year, but rather where it was obvious over a period of time. (R. 592)

3.) The State has the right to enforce its antitrust laws. Sections 133.01 and 133.02, Stats. Such actions are brought by the Attorney General in the name of the State. *State v. Allied Chemical & Dye Corp.*, 9 Wis. (2d) 290, 101 N. W. (2d) 133 (1960).

But it is strenuously contended that the State of Wisconsin is not the real party in interest; that from the record it appears that the action is brought for the benefit of private citizens who are the instigators of the action; that the action is not for the public interest of Wisconsin but for the profit of private citizens. In this connection the defendants make specific reference to the local residents who first comprised an informal group and later incorporated as Teams, Incorporated, which had as its purposes the encouragement and promotion of strong community support for professional sports in the metropolitan Milwaukee area and the coordinated and continuous effort to attract the metropolitan Milwaukee area professional sport teams and professional sports events. (Exhibit 148) More specifically reference is made to the officers, directors and stockholders of Milwaukee Brewers Baseball Club, Inc., which incorporated under the Wisconsin Business Corporation Law on the 29th day of July, 1965, to engage in any lawful activity within the purposes for which a corporation may be organized under the law, but specifically to acquire a franchise to operate a Major League baseball

club in this community. (Exhibits 29, 147) The corporation (Milwaukee Brewers Baseball Club, Inc.) is not a non-profit organization under the laws of this State.

Chapter 134, revised laws of the State of Wisconsin 1965, an act to recreate Section 59.07 (25) of the statutes, effective July 12th, 1965, authorized Milwaukee County (counties in the state having a population of 500,000 or more) to own and operate a professional baseball team, appropriate money for the purpose of a franchise for such team, and in the discretion of the County Board to organize and maintain a non-profit corporation for such team ownership and operation or participation with others in the formation and operation of such corporation. Defendants refer to County Resolution, File No. 65-943 (Exhibit 415) adopted by the County Board of Supervisors of Milwaukee County on July 20th, 1965, authorizing and directing the proper county officers on behalf of Milwaukee County to apply to the National League of Professional Baseball Teams and to the American League of Professional Baseball Teams for a franchise to own and operate a professional baseball team in the City of Milwaukee, Milwaukee County, Wisconsin. That resolution provides that in the event a franchise is granted to Milwaukee County, and thereafter, a private corporation organized for the purpose of owning and operating a Major League professional baseball team is desirous of acquiring such franchise, it will be transferred to such private corporation provided (1) the corporation has such capital to own and operate a Major League baseball club, (2) that the controlling stock in such corporation is owned by residents of Milwaukee

County, and (3) that Milwaukee County is reimbursed for all expenses incurred in acquiring the franchise. (Under amendment to League rules the League must approve of the transfer of ownership.).

In seeking to recover a forfeiture the State has a pecuniary interest in the lawsuit and is the real party in interest and, in the court's opinion, if the injunctive remedy was the sole relief sought the State would be the real party in interest in bringing the action to enforce the antitrust laws in its sovereign and governmental capacity as the statute directs. The possibility that the County of Milwaukee or private citizens may incidentally be benefited by this action does not nullify the State's real party in interest status or convert the action to a private lawsuit between individuals. The incidental beneficiaries of this action are not the real parties in interest. See *Griffin v. United States*, 168 F. (2d) 457 (8th Cir. 1948), *United States v. Fitzgerald*, 201 Fed. 295 (8th Cir. 1912), *Hertz v. Knudson*, 6 F. (2d) 812 (8th Cir. 1925), *State of Indiana v. Allegheny Oil Co.*, 85 Fed. (C. C. N. D. Ind. 1898), *Grinnel ex rel. Chicago Hospital v. Johnson*, 28 Fed. 2 (C. C. N. D. Ill. 1886). See also *Town of Blooming Grove v City of Madison*, 275 Wis. 328, 81 N. W. (2d) 713 (1957). Reference is also made to the opinion of Hon. Robert E. Tehan, Judge, United States District Court for the Eastern District of Wisconsin, on remand of this action.

4.) Defendants maintain vigorously that the plaintiff does not come into court with clean hands. In this they would identify the private citizens and civic leaders, heretofore referred to, who they say are the instigators of this

action, as a group for whose benefit the action is brought. Under the rules of organized baseball a Major League club can operate only by the authority of a franchise granted by one of the two Major Leagues. No specific group, corporation or municipality can have the assurance by this action that they will be the recipient of such license. They are not the parties in interest.

By instigators counsel refer to the members of Teams, Incorporated and the Milwaukee Brewers Baseball Club, Inc., public officials and parties not members of those two groups. They use the word in the sinister meaning of inciting, goading or provoking. In such sense the parties referred to are neither the instigators of the litigation nor the parties behind it. It is undisputed in the record that some of the parties referred to did meet with County officials and with the Attorney General of the State and did give them the benefit of their information. They procured the Oberdorfer opinion (Exhibit 166) and submitted it to the County Corporation Counsel and to the Attorney General's office, but it can hardly be said that in these things they acted in any respect other than citizens, at most citizens who were informers, even if they encouraged the commencement of the litigation. So far as this record discloses, there is no evidence which can impugn or reflect upon the motives of the Attorney General of Wisconsin in commencing the litigation.

It appears from the record that some parties associated with the two groups above referred to, advocated the purchase of a franchise of a Major League club in another city

which, if accomplished, would have deprived that community of Major League baseball. On October 16th, 1964, Attorney Richard Cutler directed a letter to Charles O. Finley, the owner of the Kansas City Athletics, inquiring, on behalf of clients, whether the club was for sale and expressing an interest in the purchase of it; that inquiry was written on behalf of persons not all known, but included several persons associated with Teams, Inc. and Milwaukee Brewers Baseball Club, Inc. That conduct of such parties prior to the commencement of this action would require the court to find them without equity if they were the real parties in interest.

5.) It is stated in the "white paper" which was presented to the League in support of the Braves' application for transfer that in the years 1953 through 1963, inclusive, over $50,000,00 of out-of-town revenues was brought into the City of Milwaukee as a result of Major League baseball. Additionally, it is represented that during the same years $2,800,000 rent was paid by the Braves to Milwaukee County for the Stadium and that the County realized another $1,600,000 in parking fees; that during this eleven year period the Braves' payroll in Milwaukee was in excess of $17,600,000 and that the Braves have purchased in Milwaukee over five and one-half million dollars of perishables for resale in the stadium. On the basis of these figures, the white paper reflects that it can be conservatively said that during this eleven year period the Braves have brought to Milwaukee over $77,500,000 of additional income which the city otherwise would not have realized. (Exhibit 10, pages 7 and 8)

Then there is baseball's book entitled "Facts" on its cover, "Baseball—An Institution" on its cover page, prepared by Commissioner Frick. (Exhibits 20, 21) Reference is made to the section thereof entitled "Baseball As a Factor In the Economy" wherein it is stated that professional baseball is an important factor in the economy of Major League cities "to an extent not usually realized" and that "although the immediate effect of a baseball club's location in a community can pretty well be measured in dollars, the intangible benefits may be of even greater importance through the years"; there it is pointed out that the presence of a big league baseball club adds to a city's qualifications as a convention site and also as an attraction to new industry and investment, and in the section of the book entitled "Major League Baseball as a Member of the Community" it is said that "No business compares with baseball as a generator of other business in the community in which a major league club is located, according to surveys made by the Chambers of Commerce of many cities." Numerous other references are to be found in "Facts" pointing out the economic benefits of Major League baseball on the economy of a community.

Mr. Warren Giles, President of the National League, testified that "the presence of a Major League ball club in a community contributes to the economy"; (R. 2344) and he testified further that it would logically follow that in taking away a Major League franchise membership there would be a detriment where there was a benefit before. (R. 2344, 2345) Mr. Frick testified that he thought it was true that restaurants, hotels, and motels, stores, taxi cab

companies, public transit companies and many other businesses directly benefit from the presence of a Major League franchise. (R. 668)

Then there is the conclusion of the economist Mr. Robert R. Nathan:* that $18,000,000 annually, is the economic impact or benefit by having the Braves in Milwaukee, and the loss per year by not having them in Milwaukee. (R. 1041, Exhibit 240, pages 91-93) Defendants maintain that the State of Wisconsin has not proved public injury or damage to the economy of the State. They state that it is a fundamental of antitrust law that the Plaintiff must show public injury. *Fedderson Motors Company, Inc. v. Ward,* (CCA 10, 1950) 180 F. 2nd 519 and *Shotkin v. General Electric Co.,* (CCA 10, 1948) 171 F. 2nd 236. They maintain that Mr. Nathan, the State's economist, gave his opinion with respect to possible injury to the County of Milwaukee and that such injury is inadequate to establish injury to the economy in Wisconsin. They refer to the testimony of Dr. John Clark,** defendants' economic expert,

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*Robert R. Nathan is a consulting economist and holds a Bachelor of Science degree from the Wharton School of Finance and Commerce at the University of Pennsylvania, a Masters degree in economics from the University of Pennsylvania and a Bachelor of Laws from Georgetown University Law School. He has been president of Robert R. Nathan Associates, Inc. since its founding in 1946. His firm acted as economic advisers to France, Burma, United Nations, Korean Reconstruction Agency, Puerto Rico, Israel, Columbia, Afghanistan, El Salvador, Ghana, Iran, Costa Rica, Trust Territory of the Pacific Islands, Republic of Korea. Mr. Nathan is the author of a number of books and reports in his field, has served as an economist for the federal and state governments and is on the board of directors of a number of corporations.

**Dr. John Clark, Jr. is a management consultant and holds Bachelor of Science and Master of Science degrees from the University of Arkansas. He also holds a Masters degree in Business Administration and a Doctor of Commercial Science degree from the Harvard Business School. He is employed by Arthur D. Little, Incorporated. Arthur D.

who they say has demonstrated that the operation of the Braves Milwaukee franchise resulted in a substantial export of funds from Wisconsin (Exhibit 506, pages 58-60); they maintain that Dr. Clark further gave his opinion based on the attendance at Braves-Cubs games in Milwaukee and Chicago that, if anything, there was a greater number of fans going from Wisconsin to Illinois than from Illinois to Wisconsin and that obviously the effect of the urban rivalry between Chicago and Milwaukee resulted in a net export of funds from Wisconsin. He noted that over the period 1956-1964 the Cubs averaged 54,453 more fans per season in Milwaukee than other clubs, while the Braves drew an average of 73,904 more fans per season in Chicago than the other clubs. To the extent, therefore, that the figures represent movement of fans between the two cities, it was his opinion that more Braves' fans went to Chicago than Chicago fans went to Milwaukee and that this represents a net outflow of funds from Wisconsin. (R. 6054, Exhibit 506, pages 54-60)

Mr. Nathan replied that if the value or cost of the Milwaukee Braves is derived on the cash flow in and out of the State of Wisconsin the resulting data will have no meaningfulness in terms of the benefit or the loss to Milwaukee and its immediate environs and in his judgment the use of the State "is utterly irrelevant from an eco-

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Little, Inc. undertakes contract research on a wide variety of projects, ranging from science, technology, engineering, management consulting, economic research, industrial development and foreign aid program. The company has offices in North America and overseas, and its clients include the United States Government, state and local governments and a number of industrial firms. Dr. Clark has taught at the Harvard Business School and has written a number of histories of industrial companies, monographs and studies in his field.

nomic point of view." (R. 644, 645) He likewise testified that there may be activities where more cash flows out than flows in which result in investment in related activities which can stimulate more jobs and more income than might be lost through the leakage of the net outflow of funds as compared with the inflow of funds. (R. 6552, 6553, 6556, 6557, 6558)

6.) From a review of the record the court concludes that the financial success of a Major League baseball operation in a community and the determination of whether the economic situation in such community is such that it can and will support the continued operation of baseball can be made only on the basis of and in terms of a reasonable period of time.

Ford C. Frick, former Commissioner of Baseball, associated with the business for over forty years, had in mind a rule of reason when he said that an owner's determination to move from a place because of the economic situation should be made where it was obvious over a period of time. (R. 592) This should not be any less applicable in the case of a transfer of ownership whereby the club becomes financially burdened.

Attendance is the prime source and generator of baseball income. Concession income is dependent upon attendance. Proceeds from the sale of baseball players and from the sale of radio and television rights are other important producers of income. Historically each of these factors tend to fluctuate substantially from time to time.

Attendance will vary—sometimes greately—dependent upon the team's fortunes on the field. A competitive team will attract attendance.

A realization of a net gain in the sale of players over the cost of acquiring players will also vary from time to time. With an adequate farm system and efficient scouting, a ball club's likelihood of developing an excess of talent remains fortuitous. The trading and sale of ballplayers is an integral part of the baseball business. The activity of a ball club in this respect depends upon the surplus of talent and the status of its development. (R. 6240, 6244) Although Milwaukee and Pittsburgh consistently have been net sellers and able to realize profits upon the sale of their ballplayers over and above the purchase of players, it is a highly variable source of revenue. (R. 6239, 6240)

The proceeds from the sale of radio and television rights are perhaps the most stable. This is because the markets in a given area are established primarily by the area coverage of the broadcasting outlets in the community. Growth is largely dependent upon the growth of the community. Nevertheless, several factors can cause this item of income to vary. Those items include the introduction of another Major League baseball team in the same area of coverage and the method of sharing the National Broadcasting "Game of the Week" proceeds. Prior to 1965 all teams did not share equally and the annual amount received by Milwaukee changed greatly in the years between 1960 and 1965. (See Line 28, Schedule 1, Ex. 10) As a result of the change, Milwaukee's share in 1965 was increased

to $287,000, which was more than double when compared to its share in 1963 and 1964. (Ex. 428)

In light of these facts it is pertinent to examine the financial operations of the Braves during their 12-year history in Milwaukee.

Mr. Lou Perini moved the Braves to Milwaukee in 1953. He continued to own the Braves until November 26, 1962, when the club was sold to its present ownership.

Mr. Perini had acquired the club in 1945. It was in very bad financial straits. He paid very little for it other than to assume certain liabilities in the amount of $305,000 and to pay for the organizational costs in the amount of $6,508. Consequently the total purchase price was $311,508. (R. 155-57) Because his auditors could not determine whether liabilities assumed covered tangible or intangible assets, the entire sum of $305,000 was capitalized and denominated as the cost of the franchise. The club did poorly on the field and at the turnstiles. In 1951 as a fourth-place club, 20½ games out of first place, it drew an attendance of only 492,461. In 1952 only a meager 281,278 fans watched the team finish in seventh place some 32 games off the pace. Upon transfer to Milwaukee in 1953, 1,826,397 fans attended to see the Braves finish in second place, 13½ games out of first place.

The team's record while in Milwaukee, in reference to attendance and position in the league standings is as follows:

YEAR	POSITION	GAMES BEHIND	ATTENDANCE
1953	1-D(2)	13	1,826,397
1954	1-D(3)	8	2,131,188
1955	1-D(2)	13½	2,005,836
1956	1-D(2)	1	2,046,331
1957	1 (1)	—	2,215,404
1958	1 (1)	—	1,971,101
1959	1-D(2)	2	1,749,712
1960	1-D(2)	7	1,497,799
1961	1-D(4)	10	1,101,441
1962	1-D(5)	15½	766,921
1963	2-D(6)	15	773,018
1964	1-D(5)	5	910,911
1965	1-D(5)	11	555,584
Average 1953-65			1,503,972

(Ex. 241)

Although the record does not reveal the exact measure of the financial success of the Perini operation in Milwaukee, there is sufficient evidence to conclude that it was exceedingly lucrative.

It was conceded that the capital gain realized by the Perini Corporation upon the sale to the present owners was within a range of $1,000,000—either way—of $5,583,000. (R. 5158, 5160) It would appear that an additional $1,869,000 was realized as retained investments unrelated to baseball, but which were produced by baseball income. (R. 5166-5170) Thus the capital gain and retained investments not transferred to the new owners amount to $7,452,000, give or take $1,000,000. Profits before Federal and State

income taxes from the baseball operations for the years of 1956 to 1962, inclusive, totaled $7,587,042. (R. 5172) Dividends in the sum of $300,000 were also paid. (R. 5178) During this period of time L. R. Perini, C. B. Perini, and J. R. Perini were paid an aggregate of $445,302 in salaries. (R. 524) Mr. Lou Perini was paid $47,240 for his services generally allocating 20 per cent to 25 per cent of his time to the Braves. (Ex. 16) The other two Perini's were paid lesser amounts and devoted 20 per cent of their time to the ball club.

The club was sold by Mr. Perini for the sum of $6,218,480. Although the price may have been enhanced by the buyers' strong desire to buy, the history of the operation in Milwaukee as just recounted indicates substantial earning power. Mr. McHale, the chief officer in charge of the playing personnel for the Braves, and Mr. Mullen, the director of the farm system, (R. 4960, 4964) made independent estimates of the value of the players acquired. There were 42 Major League players and 160 minor league players. It was their judgment that the total value was approximately $9,000,000, $6,000,000 allocated to the Major League roster and the balance allocated to the minor league players.

The plaintiff maintains that the financing associated with the change of ownership is relevant to the decision to move.

Some of the present owners of the Braves held a minority interest in the Chicago White Sox. In the latter part of October, 1962, they were apprised of the opportunity to

buy the Braves through a broker who was subsequently authorized to negotiate in their behalf. Mr. Bartholomay testified that the whole deal took place in three weeks. (R. 2434) The agreement to purchase was executed on November 11, 1962. (Ex. 42) No examination was made by the buyers of the financial operation of the club prior to purchase, no representations were made, nor could it be recalled if any of the new owners asked for information concerning the financial history of the Braves. (R. 2558-2560) Mr. Bartholomay had owned a few shares of stock of the Perini Corporation so that he had some information indicating that it was a successful operation. His judgment in reference to the price was based upon the experience of the purchase of 46 per cent of the White Sox stock for $4,300,000. It was his opinion also that a National League team was more valuable. He conceded that the White Sox stock also represented ownership in the ball park as well as the club. This, of course, was not true in reference to Milwaukee.

No specific inquiry was made concerning the 1962 attendance, but he was aware that it had declined. He believed Perini was not too popular in Milwaukee and stated that if the popularity of the ownership could be corrected to some degree and the attendance restored, the operation had to be successful. (R. 2559-61)

It was denied that there were discussions considering the possibilities of a transfer of the franchise at the time of the sale.

The stock was actually sold to a holding company organized by six persons who were formerly minority shareholders of the White Sox team. Eventually the group was expanded to thirteen and the holding company designated as the Milwaukee Braves Baseball Club, Inc.

An operating club named the Milwaukee Braves, Inc. was organized on November 15, 1962. Mr. Perini was given the option to purchase stock which he fully exercised by January 28, 1963.

As a result, 84.6 per cent of the stock in the Milwaukee Braves, Inc. was held by the Milwaukee Braves Baseball Club, Inc., and 15.4 per cent was held by the Perini Corporation. The shares of the parent company were subject to a 10-year voting trust wherein Messrs. McHale, Bartholomay, Reynolds, Louis, Searle, and Coleman are the voting trustees.

The total acquisition price including broker's commission was $6,218,480. Payment was scheduled as follows:

Cash payments to Perini Corporation			
Initial deposit	11/16/62	$ 500,000	
Balance	1/ 4/63	5,237,847	
			$5,737,847.00
Deferred portion—upon collection of accounts due to Perini			157,150.00
Assumption of net liabilities			163,483.00
Commissions payable to broker			160,000.00
			$6,218,480.00

The downpayment of $500,000 was borrowed from the First National Bank of Chicago upon a short-term loan

personally guaranteed by the original promoters. Another $3,000,000 was secured upon a term note from the First Wisconsin National Bank. The group then purchased $2,850,000 of the total $3,100,000 stock capitalization of the holding company. Of this amount $1,500,000 or $1,600,000 was borrowed from the First National Bank of New York by the individual principals who pledged the stock of the holding company as security. (R. 2527, 2528) The remaining $1,250,000 was paid by check. When asked whether any of the latter amount was borrowed, Mr. Bartholomay stated he had no recollection in reference thereto. When asked whether he had borrowed money for his share of the equity, he refused to answer. (R. 2528-30) Each of the promoters acquired 7 or 8 per cent of the equity of the holding company with the exception of several who purchased less.

After an unsuccessful effort to interest local capital in investing in the operating company to any substantial degree, a public offering was made. Substantial investments had been sought from local businessmen. It is said that there was a lack of enthusiasm on the part of those persons solicited. But none of the parties had other than a casual knowledge of the individuals comprising the Bartholomay group who were not local people. None of the Bartholomay group had any extensive experience in baseball nor had demonstrated any ability as baseball entrepreneurs. All that was being offered to the selected Milwaukee businessmen was a minority interest in the operating company—a fractional interest which had proven distasteful to the Bartholomay group when they were minority owners of the White Sox. (R. 4668) Furthermore,

no payment of any dividends could be anticipated until repayment of the $3,000,000 note was made and then only if available cash and operating profits would warrant such.*

The public offering was made after the failure to interest substantial local investors. Although Mr. Bartholomay stated that the only purpose of the three week public offering was to provide an opportunity for some local ownership and not to raise money (R. 2549), the prospectus prepared by the Robert W. Baird & Co., offering 115,000 shares at $11.37½ per share, indicated that $900,000 of the proceeds would be used to pay a note to the Marshall & Ilsley Bank due on May 3, 1963. The proceeds of this note had been used to finance in part the acquisition of the team from the Perini Corporation. The balance of the proceeds was to be used as working capital. (Ex. 13) Only about 13,000 to 14,000 shares were sold.

Other than certain assets held for collection and the benefit of the Perini Corporation, and others subject to certain liabilities, the new owners acquired a franchise, 203 player contracts, and some fixed assets associated with the concession operation.

The concession property was placed upon the books of the new corporation at the amount of $12,099, the franchise

*The terms of the note called for principal payments of $500,000 on June 1, 1966; $500,000 on June 1, 1967; and $2,000,000 on June 1, 1968. Interest was payable at a variable rate ranging from four to five and a half per cent. The agreement also provided for annual sinking fund payments to be applied as prepayments on June 1 of each year in an amount to be determined by the excess of cash flow as defined by the agreement. Player, radio, and television contracts were pledged as security. The note also provided for 7 per cent interest on any installment unpaid after maturity. (Ex. 422)

at $50,000, and the player contracts at the amount of $6,-128,000. (R. 4955-57, 4960)

Because the franchise item is not amortizable and the player contracts are capitalized, there is a tax advantage in keeping the franchise value low and the player contracts high. The latter can be capitalized and amortized over a period of years and charged against income during the life of the assets assigned to them. (R. 5206)

The defendants sought to justify the allocation of $50,-000 to the franchise on the theory that this was the amount which was paid as the franchise cost into the league in 1961 by the Houston Colts and the New York Mets when the league was expanded in that year to include them. (R. 4957)

The accountant for the Braves in response to an inquiry of whether the value of a franchise of an expansion team was the same as an existing team stated that such was a matter of judgment and that he, as an accountant, could not answer the question. (R. 5191) This figure had not yet been approved by the Internal Revenue Service for the reason that the Braves' tax returns had not been examind by the I. R. S. (R. 5193) Mr. Perini had assigned the sum of $305,000 on his books for the franchise when he acquired it in Boston for reasons previously set forth.

In reference to the franchise value it is also observed that the Braves paid a total of some $500,000 for the territorial rights in Atlanta to the Atlanta Crackers and to the International League for indemnification for the loss of income resulting from not playing in the area. (R. 5196)

Any analysis of the profits of the Braves must take into consideration the fact that the amortization of the players' acquisition costs were handled differently upon the company's books than for tax purpose and that fast write-offs of the costs of the annual player acquisitions are allowed by the taxing authorities.

Baseball is permitted to expense annual expenditures for team replacement and development against income in the year incurred. Team replacement and development includes bonuses paid to free agents, farm team costs, and the purchase of player contracts. (R. 5015) A different method is required in reference to the original purchase of the ballplayers' contracts upon acquisition of the ball team. The amount allocated to the player contracts, acquired by the purchase of the club, in the sum of $6,128,000, was reduced by $213,300 realized in that year from the sale of some of those contracts. This left a balance of $5,955,000 to be amortized in the future. Presumably the right to expense the cost of subsequent acquisitions of ballplayers in the year acquired as distinguished from the original group is permitted because the uniform player conrtacts are for one-year contracts only. As a practical matter, a ballplayer is bound to the owner as long as the owner desires by virtue of the operation of the reserve clause. (R. 5208) The same treatment was not permitted in reference to the original acquisition in order to avoid a full $6,000,000 deduction in the first year. (R. 5010-11).

A different treatment was accorded to the amortization of player contracts and team development and replacements costs upon the books of the company. It was deter-

mined by the Braves' accounting firm to amortize the original player contracts over a 10-year period on a declining balance. The net annual expenditures for new player contracts, farm expenses, and bonuses paid over and above the proceeds obtained from the sale of players other than the original group, however, were amortized over an eight-year basis on a straight line method.

The basic difference in the amortization of these items was that in both systems the costs allocated to the original players acquired by the purchase of the club were amortized on a ten-year declining balance basis, but for tax purposes the subsequent net acquisition and development costs were expensed annually whereas they were amortized on an eight-year straight line basis on the books of the company. Scouting expenses were expensed in the year incurred under both the books of the company and for purposes of tax accounting.

The effect of the different treatment of those items is to produce far greater annual deductions for players acquisition costs chargeable against income under the tax accounting system than upon the books of the company.

Attendance in 1963, the first year of operation under the new ownership, was 773,018. This was a slight increase over the low of 766,921 in 1962. A number of factors considered elsewhere in this opinion were operative. On the field the team slipped to the second division. Ranking sixth, it finishd 15 games out of first place. Book losses amounted to $43,378 (Ex. 425) and tax losses amounted to $888,250. (Ex. 17)

A financial comparison with the previous year under the Perini operation is complicated by the fact that no player contracts were carried on the books of the operating club of the Perini Corporation and the acquisition and development costs of players were expensed rather than capitalized. (R. 524)

Some comparison can be made by resorting to Schedule 2 of Exhibit 10 which shows the cash flow from the "at home" operations on income and expense basis.

Despite the addition of some $123,500 for interest to service the $3,000,000 term loan, the loss from the "at home" operation was only $261,400 in 1963 as against a loss of $321,700 in 1962. When income for national television was added and the sale of players, the profit on a cash basis was 138,700 in 1962 and 66,000 in 1963. During those years the amount realized from the sale of players was about $8,000 higher in 1962 and $125,000 more was obtained as the Braves' share of the "Game of the Week" in 1962 than in 1963.

This data, except for national broadcast income and the proceeds from the sale of players, represents income from home operations only. (R. 422)

Actually the total net income from all operations produced a profit of $82,393, but interest expenses in the amount of $125,771, resulted in the book loss. (See Exhibit 14) All but $354.00 of the interest charges were attributable to the First Wisconsin National Bank term loan. (R. 4946) These figures include a write-off of $689,346 for player contracts upon the book method previously described. It

also appears that the same range of expenditures for player development in the area of a million dollars was made in 1963. This was about the same amount expended in the previous year so that efforts to renew the quality of the playing team did not suffer. Player development embraces farm costs, scouting, and bonuses paid. Executive salaries and personal expenses were paid to Mr. John McHale as president in the amount of $51,000 and to Ralph Delforge as secretary and assistant treasurer in the sum of $14,233.

In 1964 attendance increased to 910,911; the club finished fifth in the race and was five games out of first place at the end of the season. Actually the race was not as close as the final standings would indicate.

Book losses amounted to $45,270 (Exhibit 426) and tax losses amounted to $847,741.*. (Exhibit 18) Although operating income increased some $400,000 because of the increased attendance and concession sales, general and administrative costs rose some $84,000. The largest single item of increase in the latter category revealed by Exhibit 18 is $35,000 for legal and auditing expenses.

In addition, there was another $48,000 charged to administrative expenses for the franchise relocation. Of this sum, $40,000 was paid to the Achilles Corporation for researching possible locations for the Milwaukee franchise. (R. 6271-75) Presumably the Achilles Corporation was retained to research the market and also evaluate the internal operations. The record is completely silent in reference

*Tax losses can be carried forward for five years and offset against profits within that period. Thereafter the amount is reduced 50 per cent. (R. 5091)

to any report or discussion concerning the latter. Interest costs were in the sum of $150,000 or almost $25,000 higher than in the preceding year. (Exhibit 426) It also appears that a little in excess of a million dollars was again paid for player development. John McHale received increases in both salary and expenses as did Ralph Delforge. The total paid to Mr. McHale was $53,278 and to Mr. Delforge was $16,510. Depreciation write-offs were in the amount of $700,302. Income from local radio and television was down $125,000 over the previous year.

Thus while net income from operations rose to 104,730; the interest charges and relocation costs altered a profit to a loss of $45,270. (Exhibit 15)

In 1965 attendance slumped to 555,584. The team again ranked fifth, but was 11 games out of first place.

Book losses rose to $918,188 before certain special items were considered. Operating income from admissions, concessions, and broadcasts went down $1,166,000 because of the poor attendance and a drastic reduction of local broadcast receipts. Amortization of player contracts increased to $751,741, and interest charges rose to $175,699.

The aforementioned special items were related to the transfer of the Braves to Atlanta.

Territorial and indemnity payments to the International League for the Atlanta territory and relocation costs in the amount of $632,930 were eliminated by proceeds from the exhibition games played in Atlanta and future rent credits totalling $777,984, so that the net loss became $733,134. Although the national television payments rose

to 278,000, local radio and television payments amounted to only $60,000. In the year previous, national TV brought in only $125,000 (Exhibit 428) but local broadcast rights produced $400,000. Player development costs were slightly increased to about $1,119,000. (R. 5031, Exhibit 427)

Estimated tax losses for 1965 were $1,390,428. (R. 5034)

Assuming the accounting methods adopted by the Braves constitute acceptable and proper accounting methods for purposes of determining taxes and for measuring costs, the court nevertheless is not persuaded that either represent a financial operating failure for the years of 1963 and 1964.

The year of 1965 cannot be considered as a fair standard. Even Dr. Clark, called by the defendants, did not include 1965 in his considerations because, as he put it, "of some rather unusual nonrecurring factors affecting attendance that year." (R. 5963) Disillusionment and resentment kept fans away from the ball park.

It is clear that the book losses for 1963 and '64 would not have occurred except for the substantial write-offs on player contracts and interest charges to service the term loan. In 1963 the write-offs amounted to $689,346 and in 1964 they amounted to $700,302. Interest charges were $123,500 and $150,000, respectively.

An analysis of Schedule 1 of Exhibit 10 as corrected by Exhibit 187 to reflect the actual figures for the year 1964 instead of the estimated expenditures for 1964 con-

tained on Schedule 1, demonstrates that the expenditures for 1963 and 1964, respectively, were generally in line for the previous Perini years of 1960 through 1962 as shown upon the schedule except for the interest payments, certain items which would reflect attendance variations, and heavier Perini administration costs including a higher executive salary structure.

Schedule 1 of Exhibit 10* is a five-year history of home income and expense on a cash basis. It assumes that the evaluation of the player contracts are the same before and after the period shown.

It shows that the team expense in 1963 and 1964 was in line with the previous years. Atcaully, they were down $60,000 from the previous $990,000 range. Concession expenses dropped in 1963 because of the low attendance, but returned to normal in 1964. Game and ticket expense in 1963 and 1964 were in line with the previous years. Publicity expenses were comparable to two of the previous three years as were spring training costs. Administrative and general expenses in 1963 were $266,600 and in 1964 were $350,600 compared to $529,800 in 1960, $454,000 in 1961 and $314,300 in 1962. Player development costs in-

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*Exhibit 10 was prepared by Mr. Delforge, who was a chief accounting officer and Secretary and Assistant Treasurer of the Braves. Actually, it was prepared as part of the presentation of the Braves to the National League in justification of its request to move to Atlanta. Bartholomay and Reynolds advised Commissioner Frick in the summer of 1964 that they were contemplating the move and that they inquired how to go about it. Mr. Frick stated that "I told them that I had felt for a long time that a transfer of a club which left a town barren was much more serious than transferring one club from a two-club city. Consequently, I urged them to give this very careful thought and very careful study, then to go back and restudy it again, and then restudy once more and to certainly make clear to other members of the League what the situation was and to prepare for them all the facts and figures possible for their consideration." (R. 599-601)

cluding farm, bonuses paid to free agents, and scouting expenses were in line all five years with the exception of 1961 when they were some $60,000 higher than the other four years.

Therefore, it becomes necessary to examine the significance of these writeoffs to the financial position of the club.

Mr. Miller, a certified public accountant called by the plaintiffs, expressed the opinion that if the value of the players under contract had actually declined by this amount during the two-year period, then the accounting in this regard was realistic. If the value has not declined, then he believed that too much had been charged to exepnse in connection with the player contracts. (R. 507) When asked whether the value of the players under contract had actually declined by $228,000 in the two years ending October 31, 1964, Mr. Wipperman, the certified public accountant called by the defendants, stated, "We made no attempt to establish the value at that time, because we were accounting for the asset on a cost basis and not on the value as may be inferred, the resale value of a player." (R. 5218) In reference to the balance of the player contracts as shown on the balance sheets at the end of 1964 remaining to be amortized, he again stated that this figure did not represent a value but merely was intended to show the cost that remained to be charged against future revenue. (R. 5223)

Thus there is no dispute that the losses in a great measure were a matter of cost accounting and do not mean that the value of the assets measured in the terms of earning power had diminished. That earning power is dependent upon the caliber of the members of the team by way of fan appeal, present and future ability to compete on the playing field, or to bring good trades or cash prices in the market place. Mr. Miller said that the true test of what player acquisition cost should be written off on a realistic basis against income depends upon whether the value of the players has declined or not. (R. 507)

Mr. Miller suggested that there were other acceptable methods of accounting. He thought that scouting expenses should be considered part of the cost of acquiring and developing baseball players and consequently capitalized. He was joined by Francis Leary in this view. (R. 5891) Mr. Leary presently is the Treasurer and Vice-President of the Los Angeles Angels and formerly was the Assistant Treasurer of the Braves between 1953 and 1960. (R. 5823) The amount of scouting expenses charged off in 1963 was $243,550 and in 1964 the amount was $259,654. (R. 508)

If the scouting expenses in 1963 and 1964 had been capitalized as a part of the player acquisition and development cost and amortized under the methods used by the Braves, the result would have been to decrease the expense in 1963 by approximately $213,000 and in 1964 by approximately $196,000. The result would have been to convert the loss of $43,378 in 1963 to a net income of $169,728. In

1964 the loss of $45,270 would have been converted to a net income of approximately $151,000. (R. 508-510)

It was also noted by Mr. Miller that the club had followed the practice of taking a full year's amortization upon a newly acquired player's contract in the year of addition. It was his experience that the more usual practice was to amortize an asset either from the date of acquisition or if they were spread throughout the year to take only one-half year's amortization on the current year's addition. Had this practice been followed, the result would have been to reduce the reported loss in 1963 from $43,387 to $7,129 and the 1964 loss of $45,270 to a loss of $8,949. (R. 510-511)

The accumulative effect on the net losses reported for 1963 and 1964 had scouting expenses during these years been capitalized and a half year's amortization been taken on the current year's player development additions would have been to convert the reported loss of $43,378 to a net income of approximately $221,000 in 1963. In 1964 the effect would have been to convert the loss of $45,270 to a profit of approximately $204,000. (R. 511)

Expensing scouting cost in the year incurred assumes that all of the money expended during the year for the acquisition of new players or the development of new players produces nothing of value beyond that year or that after the year ends there remains nothing of value to the club. (R. 512-13) An analogy between the reseach and development expenses of a commercial business was made to the scouting efforts and expenses in baseball. Both

endeavors seek to find and develop a capital asset which will produce income. In this regard Mr. Miller stated that the most widely followed practice was to determine the results attributable to the research and development, if any, and then capitalize those expenses related to the development of that product. Those expenses of research which produced nothing of value to the corporation are then charged off as an expense item. (R. 544) Mr. Wipperman agreed that the concept of research and development in terms of accounting objectives is to associate the cost with the benefit received. He stated that if one can associate clearly the cost with the benefit received, it is appropriate to capitalize such cost and amortize it over a relatively short period of time. If such cannot be associated directly with a benefit, a preferred practice and a more conservative practice is to expense the item immediately. He did not think, however, that scouting expenses were comparable to research and development costs.* (R. 4973) He stated that he felt that he had no right to capitalize scouting costs because there was nothing to associate such with until a ballplayer was assigned. Scouting costs consist of salaries, traveling, and entertainment of the scouts and "bird dogging." The latter simply refers to the practice of paying a finder's fee to a person not under contract who produces a ballplayer who is signed to a contract by

*The 1963 Annual Report to the Braves' stockholders over the signature of John McHale as President stated as follows: "Our expenditures for team development are comparable to other business and industries' expense for research and development. This department is the life line to the future." The financial statements contained in the report were produced by Arthur Andersen & Co.

the team. (R. 4971-72) Obviously scouting does produce capital assets in the form of ballplayers.

The fact that the amortization of player development costs is a matter of cost accounting rather than a system to reflect the financial worth of a baseball team is demonstrated by several other considerations.

Accountants for the Braves determined to amortize the original pool of players upon a 10-year life on a declining balance basis. After consultation with the management and reference to the Celler Committee Reports, it was concluded that in order to maintain a Major League roster it was necessary to bring up four players a year into the Major Leagues from the minor league system. A ten-year depreciation basis was reached by dividing the 40-man roster by four players per year. The fact is that the excellence of the farm development program of the Braves resulted in the advance of 51 players to the Braves' Major League roster in the five years previous to 1963, plus the acquisition of 11 players in trade for 15 players developed in its farm system. (Exhibit 13)*

Instead of producing four Major League players as assumed, the Braves had in the past five years produced 51 Major League players or an average of 10 per year. Had this data been utilized in determining the life of the play-

*The prospectus prepared for the offering of 115,000 shares of common stock of the Milwaukee Braves, Inc. on March 14, 1963, indicated that the Braves then owned and operated two Class A minor league clubs and had working agreements with two Triple A clubs, one Double A club, and two additional minor league clubs. The management believed that the seven farm clubs it owned or with which it had working agreements were well operated. The Braves were the only major league club with two Triple A farm clubs and there was only one other major league club which had as many farm clubs as the Braves.

ers, the average life for amortization purposes would have been four instead of ten. The rate of amortization would have been two and half times greater and the book losses multiplied accordingly.

The correctness of the 10-year basis is also challenged by the use of an eight-year life for subsequent player acquisitions. There is no real justification for the different basis when viewed in the light of realities. No determination was made upon which it could be concluded that the playing life of the original players purchased as contrasted to the subsequent acquisitions differed when measured in terms of the actual age of the individual ballplayers, their status of development, and their potential future ability, and all the other factors which actually determine the playing life of a ballplayer. The determination to use an eight-year life was the combined judgment of Mr. McHale and Mr. Mullen. (R. 4978)*

The fact of the matter is that the accountants sought to obtain a long-term rationale which would provide some stability of amortization for tax purposes. Other alternative methods were investigated and rejected in an effort to conceive of a more appropriate method of amortization. A method whereby values on a player-by-player basis would be placed on the individual players was rejected because of the difficulties in determining the values. An attempt to try to develop an average cost of ballplayers similar to testimony contained in the Celler Committee Reports was

*This was said to have been done upon consultation of the accountants with the management of the Braves and other clubs. (R. 4978)

rejected as being too nebulous. The possibility of having management allocate cost in relationship to a year-to-year valuation was eliminated because the appraisal of management was not subject to the accountants' independent verification. (R. 4966, 4967) When asked why the Braves did not choose to adopt the tax basis of depreciation, Mr. Wipperman stated that the Braves were engaged at the time in an offering to the public and the application of the tax method would have resulted in significant write-offs in the early years which would not really portray the operation of the club commensurate with its character as a top-flight Major League team. (R. 5061)

The system finally adopted was such that large amounts of depreciation of the original player contracts came in the early years with lesser amounts later. By using the straight line method of amortization for subsequent team expenditures, the amounts were smaller in the early years, then would pyramid up to the point of eight years and thereafter would tend to level off. The net effect was to produce a fairly level and constant amortization of player contracts and development cost against annual income. (R. 4979, 4980)

Too rapid depreciation in the early years also would produce tax losses which because of their size might not be available as offsets against future profits under the five-year carry-forward provision.

This analysis is not to suggest that the methods used by the Braves were improper cost accounting or tax methods. Nevertheless, an evaluation of the financial operation

of a baseball team must fully consider the effect of the policy used to amortize player contracts and team replacement and development costs.

Schedule 1 of Exhibit 10 portrays the five-year history of the financial operations of the Braves between 1960 and 1964 upon an income-expense-cash basis excluding amortization of assets. It was as follows:

Year	Net Income or Loss
1960	$594,000
1961	(50,400)
1962	138,700
1963	66,000
1964	73,800

The total income for the five-year period was $836,900 or an average cash income of $167,380. These figures include the receipts and disbursements from the sale and purchase of ballplayers which is admitted by the defendants to be an integral part of the operation of a baseball club. The loss in 1961 under Perini was primarily occasioned by an increase of some $600,000 additional in expenditures for a farm system, bonuses paid, and scouting operations desipte a substantial but lesser increase in the sale of baseball players that year. The years of 1963 and 1964 include the interest charges and relocation costs previously referred to herein.

In summary, the court makes a number of conclusions concerning the financial operation of the Braves in 1963 and 1964 under the management of the Bartholomay group.

Book losses resulted primarily from the depreciation of the player contracts and the costs of player development and replacement. The cash flow did not impair the continued development of the quality of the team; each year between 1960 and 1964 a consistent amount was spent by both managements except in 1961 when Mr. Perini spent an additional $600,000. Consequently, there is nothing in this record to suggest that the value and the earning power of the team was diminished because of these book losses. All of the accountants agreed that such losses did not reflect loss of value.

Interest charges to service the equity investment indebtedness of the club and relocation expenses were the items which put the operation in the red in 1963 and 1964. The former is completely unrelated to any loss of attendance. In 1963 after depreciation there was a net income from operations in the amount of $82,393. The interest payment of $125,771 produced the book loss of $43,378. (Exhibit 14) In 1964 after depreciation there was a net income from operations in the amount of $104,730. After deduction of the interest paid, in the amount of $150,000, the book loss was $45,270. (Exhibit 15) If the relocation expenses were eliminated in 1964, the Braves, under their own method of accounting, would have shown a book profit of approximately $3,000. (R. 6273)

Had the scouting expenses in 1963 and 1964 been capitalized pursuant to the same method used by the Braves for player acquisition and development costs as suggested by Mr. Miller and Mr. Leary, the expenses for those years

would have been decreased by approximately $213,196, in 1963 and $196,000 in 1964, respectively. (R. 509) This, then, would have produced a net income before taxes of approximately $170,000 in 1963 and $151,000 in 1964.

Equally important in the decline of profits in 1963 and 1964 was the fact that national television income decreased to less than one-half the amounts received in 1960 and 1961 and to one-half of the amount received in 1962. These reductions were $125,000 to $188,000 and resulted from the team's drop in the standings. (R. 6203)

The tax losses are of considerable importance in terms of the Internal Revenue Service allowances for carrying losses forward to be offset against future profits if realized in the next five years. (R. 5018)

7.) From the record it appears that Mayor Allen, of Atlanta, had lunch with Mr. Reynolds ("maybe Mr. Coleman was there") of the Braves at the All Star game in Cleveland, Ohio, in July of 1963, where, as the Mayor testified, there were the normal selling efforts to try to obtain a franchise for his city. (R. 2369)

At that time Mr. Finley of the Kansas City Athletics had already given the Mayor a commitment to move the Athletics to Atlanta if that city would build a stadium. (R. 2370, 2371) Notwithstanding, the Mayor talked to the Braves' representatives because as the witness testified Atlanta was attempting to attract Major League baseball and Mr. Cronin, President of the American League, had not indicated that this was necessarily a move that was going to put the Kansas City team in Atlanta.

From the record it further appears that Mayor Allen and Mr. Richardson next met Mr. Reynolds at a motel in Chicago in the spring of 1964. The Mayor could not recall whether it was in February, March, April or January but the date appears to have been established as April 4th.

The Mayor testified "I think the gist of the meeting to the best of my ability to say, was that we were hoping that we could get a contract and that we, that I took the position that any contract that would be similar to the contract that Milwaukee then had would be satisfactory to Atlanta; that we could support and defend a contract of that nature, and the Milwaukee contract was extensively discussed. The meeting probably lasted an hour and a half. I insisted that from the viewpoint of what it would, what Atlanta had to do in order to provide the necessary facilities could be justified on the basis of a contract similar to the one in Milwaukee. * * * At that time, although there may, I think that our Chamber has had a general survey of various Major League contracts and that I, that was about—no, another matter was discussed there and that was how much parking would be available at the stadium that we were then getting ready to build, the extent of the parking. * * * Mr. Reynolds was interested in the development of the stadium and the amount of parking. We discussed the terms of the Milwaukee lease. I think he evidenced a major disappointment in the support that he was getting in Milwaukee and he made it plain to me as an interested party that he could not commit the Braves, that he was a part owner, that he served as general counsel,

that he could not commit the Braves, that any move of the team had to be approved by the National League."

When asked whether Mr. Reynolds said he would recommend such a transfer, the witness replied he could not answer that. He testified, "In the general conversation that was held there, there were no definite commitments made that would—he indicated disapointment. He indicated great interest in what we were doing. I can't resurrect all of an informal conversation that was held in the spring of '64 again, except to give you the gist of the conclusions that I came out of there with."

When asked whether the gist of the conversation included an indication by Mr. Reynolds that he favored such a move, the witness answered: "I think we were convinced that they were suffering severe disappointments in Milwaukee and that they were giving very, that they were looking, that they were considering other places and Atlanta was foremost in their minds, yes, sir, I don't think there is any doubt about that. That would have been my observation as a person trying to sell a product and close an order."

When asked whether he understood that to be an informal commitment on behalf of the Braves to move to Atlanta providing the other owners of the National League agreed pursuant to the rules, the witness responded:

"A I would say in informal terminology that their attitude, their disappointments in Milwaukee, their interest in Atlanta, what was going on down here to provide the facilities would have brought me to

the point of saying that they were, that if these things came to pass in this way, that Atlanta could be assured of getting a contract for a Major League club subject to all of the things you have to go through with, approval of the National League and all of these things, yes, sir. Somewhere, somewhere in our mind certainly was this thought and idea.

"Q And the Major League club you refer to is the Braves?

"A The Major League club I am referring to in the spring of '64, or the Major League club I am referring to at that time is the Braves." (R. 2375-2385)

Sometime prior to the middle of July, 1964, Mr. Bartholomay and Mr. Reynolds visited Commissioner Frick and informed him that they were contemplating the move and they wanted to know how to go about it and inquired what he thought of it. (R. 599)

8.) Schedule 2 of Exhibit 10, the "White Paper," was prepared by Mr. Delforge at the instruction of Mr. Bartholomay for presentation to the National League owners to justify the move to Atlanta. It was a projection of the club's future cash requirements for 1965 through 1969 based upon certain judgments.

It assumed a debt service of $500,000 per year, a net yield of $1.71 per capita ticket including concession income, a $1,700,000 cash requirement to run the baseball operation, a cash need of $1,050,000 for player development including the cost of the farm system, scouting, and bonuses to be paid to free agents, payment of rent in the amount of $100,-

000, income to pay the interest upon the term loan to start at $150,000 in 1965 and decreasing at the rate of $25,000 each year thereafter, and money to make certain capital expenditures in the amount of $15,000 annually except 1965 when the sum of $142,000 was necessary for the final payments due on the purchase price. (R. 358-362)

Although the debt service was projected on six annual payments of $500,000 each, the note called for annual payments of $500,000 in 1966 and in 1967 and a balloon payment of $2,000,000 in 1968. The per capita ticket yield, the costs of the baseball operation and player development and acquisitions were based upon actual experience. (R. 358-360) Mr. Delforge assumed an annual rent of $100,000 from what he considered was either an offer or a likelihood of what the rent would be, based upon preliminary negotiations with County representatives.* The capital expenditure item included $127,000 still due on the purchase price in 1965 and an annual expenditure of $15,000 to cover a normal budget of future purchases for such items as tarpaulins, typewriters, lawn mowers, etc. (R. 362, 431)

Income items not related to attendance at home were then developed by Mr. Delforge. These included revenue derived from playing on the road, sale of local broadcast rights, certain miscellaneous items of income, revenue from the operation of the concessions departments at the stadium at events other than baseball. The assumptions as to the

*The discussions amounted to a proposal for the forgiveness of the concession rent. This formula would have produced an annual rent in 1964 in the amount of $80,000. Mr. Delforge rounded out the figure to $100,000 as his best judgment of what the minimum rent would be in the future. (R. 361, 428)

amounts these items would produce were based upon Mr. Delforge's experience as Controller of the Braves. (R. 366, 367) Proceeds to be realized from the sale of local broadcasting rights was based upon a firm offer.*

Based upon these assumed receipts and expenditures set forth in the schedule, the cash required to operate the club and to provide for the debt retirement was determined. (R. 432) This also included player development and replacement needs. Using the per capita average of $1.71 per ticket an attendance of 1,536,800 was required in 1965 and approximately 1,400,000 in each of the subsequent four years. These attendance figures were subject to reduction at the rate of 60,000 tickets for each additional $100,000 produced from national television or the sale of players.

The schedules were prepared four or five days prior to October 21, 1964, in preparation for a meeting of the Board of Directors to be held on that day. Wisconsin members of the Board were told by Mr. Bartholomay that he had reason to believe that his recommendation to request permission to move would be upheld by the majority of the Board and he was giving them a chance to resign because it might embarrass them to have to attend such a meeting and vote in such an important matter. (R. 4585)

The schedules were presented to the Board at a meeting at the Racquet Club in Chicago on October 21, 1964,

*On September 9, 1964, a written offer was made to the Braves by the Joseph Schlitz Brewing Company for the exclusive right to broadcast all games on radio and televise the same number of games televised in 1964 at the price of $525,000 for 1965 to 1967, inclusive. (R. 4698)

and the decisio nwas made to request permission of the National League to transfer to Atlanta.* (R. 353) Mr. Fitzgerald, a Wisconsin director, observed that the requirements set forth could hardly be termed a breaking-even point in that they produced a doubling of the equity investment in a short time and also paid the interest charges. (R. 375) That evening Mr. Delforge went to New York where a team of persons with a hotel stenographer prepared the narrative of Exhibit 10 which resulted in the "White Paper." (R. 375, 376)

A copy was then delivered to Commissioner Ford Frick who cryptically remarked that this is not quite what he expected. (R. 377)

Mr. Gordon Volz, another certified public accountant testifying in behalf of the plaintiff, applied the same accounting principles used by the Braves' accountants in reference to amortization of player contracts and development expenses and the depreciation of the annual investment of capital items to determine what profits would have resulted before taxes assuming the figures set forth in Schedule 2 of Exhibit 10 were fulfilled. (R. 458) This information is set forth on Exhibit 189 and is as follows:

*The vote in favor of the motion was twelve to six with the six Wisconsin directors voting against it. Later that month the name of the corporation was changed to the Atlanta Braves, Inc. (R. 2410)

Profits Before Income Taxes*

Year	Amount
1965	$682,300
1966	505,200
1967	450,200
1968	390,700
1969	327,100

The percentage of profit on an equity investment of $3,000,000 would have been 22.74% for 1965, 16.84% for 1966, 15.1% for 1967, 13.02% for 1968, and 10.09% for 1969. (R. 458, Ex. 189)

Neither the Volz projection on Exhibit 189 nor the "White Paper" included any revenue from national television. As previously stated, the "Game of the Week" was shared equally among the National League teams in 1965 and brought the Braves some $287,000 and there was reason to expect that the amounts to be realized in the future would be equal or greater. (R. 5563-5566)

An examination of Exhibit 241, which shows the attendance of the National League since 1950 and the standings of the teams in the competition for those years reveals the drastic demands required by the "White Paper" to "break even."

The required home attendance set forth on Schedule 2 has not been matched by the Chicago Cubs, the Cincinnati Reds, and the St. Louis Cardinals. The Reds and Cards failed to do this even in the single years in which they re-

*There would have been no federal income taxes payable until 1968 due to a tax loss carry forward. (R. 462)

spectively won the pennant. Philadelphia would have succeeded but once and that was 1964 when they failed to win the pennant by one game. Pittsburgh would have made the grade only in 1960 when it won the pennant. The New York Giants failed to do this in New York between the years of 1950 and 1957 even though they won the pennant twice in that period. Even the Dodgers, while dominating the League between 1950 and 1957, couldn't do this in Brooklyn. During those years they won the pennant four times, finished second three times, and third once.

No team has been able to demonstrate such a sustained attendance record over such a protracted period as suggested by the "White Paper" except Milwaukee in its miracle years, the Dodgers and Giants. In each instance a transfer to a new locality was involved.

Breaking even in terms of Schedule 2 included the retirement of debt and the correlative increase in net worth at the rate of $500,000 per year. Had the projection included national television revenues, which the owners had every reason to anticipate at the time of their decision, $300,000 additional profit should be added to the amounts above set forth.

Indemnities by way of rent contributions from the Fulton County Recreation Authority towards relocation liabilities were granted the Braves (Ex. 427) and assurances of television contracts which have now ripened into gross sales of $2,500,000 were given. The latter will net between $1,300,000 and $1,500,000. (R. 4700)

9.) Because of the importance and wide publicity of the possible move of the Braves to Atlanta, the subject was made a matter of special consideration at a special meeting of the National League in Chicago on August 10th, 1964. President Giles asked that the matter be discussed. He inquired if any club desired to request the league's consent to transfer its membership of location and said, if it did, he would ask unanimous consent to consider the request at this meeting. The Braves' representatives informed Mr. Giles that they had been considering the possibility, but were not in a position at that time to make a decision. They proceeded to inform the meeting as to the problems which caused them to consider relocation and they answered questions on the subject by other clubs. (R. 2259, Ex. 69)

An application for permission to transfer the franchise to Atlanta was communicated to the National League office by the Braves on October 21, 1964. (Ex. 9)

On October 22, 1964, a special meeting was held in New York to consider the application. Although the meeting was advised that it was legally permissible to proceed to act upon the application despite a restraining order issued by the Circuit Court of Milwaukee County, Wisconsin (Case No. 325-682), served on the Braves, it was decided to defer action until the Braves were free of legal restraints. It was agreed that the application should not be handled by a telegraphic vote.

A telegram from Congressman Henry Reuss of Wisconsin was read as were others. Mr. Eugene H. Grob-

schmidt, Chairman of the Milwaukee County Board of Supervisors, was permitted to enter the meeting and read a prepared statement in opposition to a shift or change to a new circuit in Atlanta, Georgia. Subsequent thereto Mr. Lloyd Larson, Sports Editor of the Milwaukee Sentinel, spoke at the meeting.

Subsequently at a special meeting held in Phoenix, Arizona, on November 7, 1964, the National League was advised that a final decision in the State litigation might require several months. After being informed by the Braves that they were prepared to operate in Milwaukee during 1965, if necessary, the league unanimously voted that it was in the best interests of the National League to permit the relocation of the club to Atlanta beginning in 1966. The authority was subject to obtaining and executing a long term lease at the new stadium in Atlanta by the Braves and the execution of indemnity agreements by the Braves and the City of Atlanta or Fulton County Recreation Authority. (Ex. 12)

Commissioner Frick did not attend any of the three meetings. (R. 2298, Exhibits 69, 9, 12)

Among the reasons given by the several owners who testified upon this trial by deposition to justify the transfer of the franchise from Milwaukee to Atlanta are a decline in baseball interest and attendance in Milwaukee, the fact that wealthy citizens did not purchase substantial amounts of stock, that the public offering of stock to the residents was a failure, that there was insufficient radio and televising broadcasting in Milwaukee to sustain baseball, a

failure to obtain a long term lease, the allowance of ticket hawking, the cumbersome sales tax without price increase to avoid the handling of small change on concession sales, an unfriendly landlord, an unfriendly press, that bankruptcy of the present owners would result if the Braves were required to play in Milwaukee and that the league was made truly national in scope by providing the great southeast section of the United States with the national game.

Most of the owners justified the transfer on the basis of the decline in attendance. The Braves' attendance record at Milwaukee from 1953 to 1965 is as follows:

YEAR	POSITION	GAMES BEHIND	ATTENDANCE
1953	1-D(2)	13	1,826,397
1954	1-D(3)	8	2,131,188
1955	1-D(2)	13½	2,005,836
1956	1-D(2)	1	2,046,331
1957	1 (1)	—	2,215,404
1958	1 (1)	—	1,971,101
1959	1-D(2)	2	1,749,712
1960	1-D(2)	7	1,497,799
1961	1-D(4)	10	1,101,441
1962	1-D(5)	15½	766,921
1963	2-D(6)	15	773,018
1964	1-D(5)	5	910,911
1965	1-D(5)	11	555,584
Average 1953-65			1,503,972

President Giles was of the opinion that the transfer of the Washington franchise to Minneapolis-St. Paul de-

tracted from the attendance of the Braves' home games. He claimed personal knowledge (R. 2268) and was so advised by Mr. McHale. (R. 2286) Judge Hofheinz of the Astros and Mr. Stoneham of the Giants were of the same opinion. (R. 5681, 5264-66, 5325) Judge Hofheinz was mistaken in his estimate of the distance of Minneapolis-St. Paul from Milwaukee. He indicated that he thought Chicago and Minneapolis were ninety miles away from Milwaukee. (R. 5618, 5619)

No survey or study was made by the league to determine the effect of the Minneapolis-St. Paul franchise on Milwaukee attendance. (R. 2268) On the contrary, there was persuasive evidence based upon a survey made by William Eberly, the Braves' ticket director, that in 1957 only about 7/10ths of one per cent of the Braves' attendance came from the Minneapolis-St. Paul area. (R. 901, 943, Ex. 77) Milwaukee had won the pennant in 1957; the Twins began playing in Minneapolis in 1961. (R. 901) Mr. Stoneham admitted that Seattle, which is about 400 miles from San Francisco, would not hurt attendance at San Francisco nor affect television sales (R. 5300); Minneapolis is some 320 miles from Milwaukee.

The court is satisfied that the effect upon Braves' attendance by the introduction of Major League baseball in the Minneapolis-St. Paul area was infinitestimal. Likewise the contrast presented by the argument that Milwaukee's contribution to the League's total attendance dropped from 20 per cent for the period of 1953 to 1960 to 8 per cent in 1961 to 1964 (R. 3616, 3617; 3678-3680) is misleading. It

ignores the fact that the team's standing had never been below second place during the first period and it was in fourth and fifth and sixth place in the second period. It ignores the fact that the league was expanded to ten teams and that two competitive teams were transferred to the populous areas of Los Angeles and San Francisco.

The Court has already noted the reasonable explanation for the failure of local residents to invest substantially in the Braves stock. There is also some evidence that stock offered by Perini at $12.25 a share in 1961 had dropped to $3.375 in 1962 which fact may well have been reflected in the attitude of local investors in 1963. (R. 4693)

There is no doubt that there were some differences and problems concerning both the lease and sale of television rights.

However, there is evidence that in July of 1964, County Executive John Doyne inquired of Mr. Bartholomay whether there was anything that the Braves wanted changed in the lease. (R. 1192) At that time the term of the lease had one year to run. Doyne testified that Bartholomay stated that the contract was satisfactory. (R. 1193) This is confirmed by Mr. McHale's testimony to the extent that he stated that they were satisfied with the percentage rentals, but for them to attempt to change several annoying problems would create bad public relations. (R. 4303, 4438)

William Anderson, stadium manager for Milwaukee County, testified that at the July meeting at which the lease was discussed with Doyne and Anderson, Bartholo-

may testified that he was satisfied and that the nuisance problems of a carry-in-beer ordinance and ticket hawking were minor irritants of no real consequence. (R. 1255) He also testified that at the same time Bartholomay was also advised by the Park Commission of its desire to assist in whatever way it could to retain the Braves (R. 1264) and Bartholomay again repeated that he was satisfied with the lease. (R. 1267)

As to the claim that the Braves wanted a long term lease and were denied such, the record is unconvincing. (See R. 1244-1251) The offers of the County to reconstruct the terms of the lease for the future were not related by the Braves to the members of the National League at the October meeting in New York when the transfer was discussed, although Mr. Grobschmidt did advise the League of this fact. (R. 2286, 2287) These offers were sufficiently firm to cause Mr. Delforge to use them in the preparation of Schedule 2 of the "White Paper."

The record does not justify giving serious consideration to the claim of problems with reference to the lease.

It is true that in 1964 there was a loss of $125,000 in proceeds from the sale of local radio and television rights as compared to 1963 (Exhibit 10 and R. 4353, 4355); however, they exceeded Perini's receipts in 1960 and 1961 by $25,000 and were $75,000 under the 1962 proceeds. Mr. McHale testified that as early as September of 1964 the Braves were advised of an offer by the Schlitz Brewing Company of a three-year contract at the rate of $525,000 a year because of the desire of that company to retain

Major League baseball in Milwaukee. The offer was subsequently reduced to writing. (R. 4315-4320, 4598, 4698, 4699)

There is contrary evidence concerning how this amount really compares with other clubs. Data under protective custody indicates that net receipts for Milwaukee for 1961 to 1964 compared favorably on the average. Mr. Wipperman, called by the defendants, stated that a comparison between the several club's proceeds from radio and television was meaningless because of the different methods of reporting such income. (R. 6204)

Some concern was expressed relative to an unfavorable political climate in Milwaukee by several of the members of the National League, particularly by Mr. Grant of New York (R. 3782), Mr. O'Malley of the Los Angeles Dodgers (R. 3857, 3883), and Mr. McHale (R. 4389). All was directed towards Mr. Grobschmidt except for one other instance. (See R. 4389) Some of the statements of the Chairman of the County Board were brash and offending and in one instance constituted a "low blow," as the press aptly described it. There is no proof in the record that the statements of Mr. Grobschmidt evinced or created a political situation. Mr. McHale stated that he enjoyed a very friendly relationship with County Executive John Doyne. (R. 4303) The Park Commission members had expressed their desire to assist the Braves as did the Greater Milwaukee Committee group which assumed the leadership of the Go-to-Bat for the Braves Campaign. (R. 4563-4576) All of these people were part of what may be referred to

as the "power structure" of the community. Mr. Bartholomay stated in reference to the 1964 ticket campaign, "There were a lot of fine successful people that were working on it." (R. 4576)

Quite naturally as was stated by Mr. Giles concerning the loss of a Major League team by a city, "Anybody that loses one is bound to be disappointed." (R. 2243)

Now in regard to an unfriendly press.

People in baseball, like people in any other public business, cannot (and indeed the record herein indicates that they do not) expect to be without the critical comment of an independent press.

There are two daily newspapers in Milwaukee, one is a morning paper, the other an evening paper.

The record in this case demonstrates that Major League baseball was covered favorably by the newspapers in Milwaukee. This was true upon Mr. Perini's arrival as well as the arrival of Mr. Bartholomay. (See R. 1717-37) The slogan, "Fill'er Up," used in the attendance drive of 1964 was suggested by Mr. Kuechle, the Journal Sports Editor. The ticket sales drive also had the full support of the newspapers. (R. 1722) A survey conducted by the Journal showed more lineage was devoted to all of baseball in the Milwaukee Journal during a typical mid-summer week than was in the New York Times. (R. 1721, 1722)

On the eve of the opening of the 1963 season Oliver Kuechle spoke of a new decade which "begins under en-

thusiastic new young ownership." (Ex. 337, 4/7/63) Concerning the possibility of reaching the million attendance mark in 1964, he stated in June that the Braves management had worked hard to sell themselves during the winter months and during spring training and had done its job well. (Ex. 341) In the interim he comended the new owners for "taking laudable steps," (Ex. 342, 5/3/63) praised "Bragan as a wise manager" (Ex. 343, 7/15/63 and expressed joy because of the news that the Braves would stay as long as welcome. (Ex. 347, R. 1882)

Mr. Kuechle ceased to be kind to the Braves when on July 5, 1964, he believed himself to be and publicly announced that he was "an innocent lamb who for too long refused to give credence to the rumors that the Braves were going to move because of the declarations of the Braves owners that they would remain in Milwaukee as long as they were welcome." (R. 1864-1871) Exhibit 331 (July 5, 1964) appears to have been prophetic. Kuechle comment subsequent to that time was not complimentary; the "Elmer" column was absurd, if intended to refer to the Court, contemptuous, but the attendance situation was not deteriorating because of press comment other than such as related to the probable departure of the Braves from Milwaukee. As noted before, on July 4th, 1964, the attendance was about 100,000 greater than at the same date on the preceding year; that the increase thereafter reached only another 38,000 can only be ascribed to the doubt and uncertainty which prevailed until the decision to move was formally announced.

Mr. Stoneham expressed the opinion that continual criticism adversely affects attendance, but that some controversy in the press is beneficial as long as one side is for you. (R. 5283-5285) It would appear that Mr. Lloyd Larson and the Sentinel provided that side as demonstrated by a sympathetic attitude to baseball and the cordial treatment he received when he tried to convince the National League to keep the Braves' franchise in Milwaukee. (R. 1914-1917)

The argument made by the owners and particularly expounded by President Giles that their approval of the switch of the Braves' franchise to Atlanta was motivated by a desire to render " a service to the great area down in the Southeast and make the National League truly national geographically" is not convincing. (See R. 2227, 2228, 2345, 2261, 2345, 5624) Atlanta and the Southeast have always been a part of the United States. The Continental League had awarded a franchise to Atlanta. If the National League desired to serve the Southeast, they could have done so by awarding a new Major League franchise to Atlanta. The great Northwest centering in Seattle remains "unserviced."

The record before this Court has spread out fully baseball's persistent refusal to expand. A graphic demonstation of this resistance is provided by the story of the struggle of the Continental League which forced an expansion of the two leagues to include Minnesota, Washington, Los Angeles. (Angels), and Houston and which made a commitment to Atlanta. (See Exs. 35 and 548)

Attendance declined steadily from 1957 to 1963, when there was a small upturn. Mr. Eberly, the Braves' Ticket Manager, testified: "The decline in attendance was most* substantially determined by the fact that the club's performance on the field was not as good during the period we are discussing. (R. 904)

Mr. Leary, the former Braves Assistant Treasurer and present Treasurer and Vice-President of the Angels, speaking of the problem of attendance generally, said:

> "I don't blame the town on attendance. I blame the ball club. If you don't have a good ball club, you're not going to get the attendance. If you have a good ball club and you don't get the attendance, then the town is bad. If you have a good competing ball club, you deserve the attendance." (R. 5897)

In 1957 Milwaukee won the World Series and had attendance of 2,215,404. The next year it won the pennant but lost the series. The attendance was 1,971,101. It is not uncommon for a repeating pennant winner to draw less in the second year. (R. 5959) In 1959 the club slipped to second place and the attendance decreased moderately. In 1961 and 1962 the club fell lower in the standing and games out of first place. In 1963, the team dropped to sixth place, improved its position in reference to the games out of first place by one half game and increased its attend-

*There were a number of other factors which were of minor importance according to Mr. Eberly. Those factors included an excise tax reduction in 1954 or 1955 which was not refunded to the season ticket holders who had purchased their tickets prior to the reduction in the tax, the departure of John Quinn and the arrival of Birdie Tebbets, a pool trade for Jack Curtis, the failure to televise ball games in the earlier years, and rather substantial admission increases in 1961 and 1962. (R. 906)

ance some 6100. They had turned the corner. Mr. McHale in the annual statement to the stockholders stated:

> "Although the increase was small, 1963 marked the first reversal of a downward trend in attendance begun in 1958. This reversal was helped considerably by an aggressive program of marketing and special promotion. It is gratifying that we have seen the beginning of a community movement in support of the Braves. Our relationship with the County in regard to the use of such a fine facility as Milwaukee County Stadium is excellent." (Ex. 14)

He continued as follows:

> "Despite this fact, (referring to the low attendance) however, we have continued to be a leader in the all-important area of future team development by investing in excess of $900,000 in 1963. Our expenditures for team development are comparable to other businesses and industries' expense for research and development. This department is the life line to the future." (Ex. 14)

The "Herculean effort" of the Braves and Teams, Inc. to sell the Braves to the fans in 1964, the season in which the attendance was 910,911, was proof, in the opinion of Mr. Grant, of the New York Club, that baseball is dead for the moment in Milwaukee. Yet the testimony indicates that the Braves might have been as high as third in the league in the sale of tickets in 1964. (R. 4429, 4430, 4431)

The several owners whose depositions were read into the record were of the opinion that Cincinnati (R. 3748, 5666), Chicago (R. 3752, 5667), Pittsburgh (R. 3805, 5666) and Philadelphia (R. 3805, 5667), are great baseball towns.

With this there is no disagreement. While comparisons can be unreliable, reference to the record does indicate numerous years when these same cities did not reach the attendance Milwaukee achieved in 1964, when the community was rampant with rumor that the Braves were playing their last season here.

It is reasonbale that there be taken into account the background of conditions that existed in this area during a large part of 1963 and persisted until November of 1964. Rumor was rife in the community that the Braves were planning on moving to Atlanta at the close of the 1964 season. Mr. McHale, President of the Braves, testified that he read press reports to that effect in 1963 "until they were coming out of my ears, and I heard a lot about it in 1964, late in '64." (R. 2186) (See also R. 3739) Such rumors would normally have an adverse effect on attendance. (R. 4861)

Notwithstanding, the decline in attendance was halted in 1963. And in 1964 the attendance reached 910,911, an increase of approximately 138,000 over the previous year. Over the three-day weekend of July 4th, 1964, the Braves played a three-game series with the Cubs at County Stadium. At that time the attendance had reached some 100,000 above the attendance at the corresponding time in the preceding year despite the fact that the team was not performing as a pennant contender, "that they were in fifth and sixth place most of the time, and had been down to eighth and ninth place a good bit of the time, and were anywhere from eleven—eight to eleven games out of first

place." (R. 1285) Mr. William R. Anderson, Recreation Director and Stadium Manager for the Milwaukee County Park Commission, testified that Mr. Bartholomay remarked to him on the occasion that the "upturn" was "very heartening." On July 3rd, 1964, the Sporting News, a national publication, reported that the Braves were moving to Atlanta. It is definitely to the credit of the community that despite the persistence of the rumors, Milwaukee, with the second smallest population among the National League cities, was sixth in the attendance standings in the National League. Although Milwaukee was in fifth place in the team standings its attendance exceeded that of Cincinnati by 48,445; Cincinnati was in second position and only one game behind the pennant winners. Milwaukee had the tenth highest attendance in both Major Leagues with only one American League City having a smaller population. Milwaukee's attendance exceeded that of Detroit and Los Angeles which were tied for fourth place in the team standings in the American League by 94,770 and 150,472, respectively. (Ex. 241)

Neither can it be said in the face of these circumstances that the civic leaders of Milwaukee and Wisconsin did not lend their full measure of support to the team. The record will not support a conclusion that the public officials were unfriendly to the Braves.

10.) The Nathan study was based upon the analysis of what was termed as the primary and secondary markets. By definition the primary market consisted of those counties within a radius of 50 miles from Milwaukee or the city being compared. This premise is justified by the testi-

mony of William Eberly, Braves Ticket Manager, who stated that 70 per cent of the attendance came from such an area. His conclusion was based upon annual studies made of ticket sales by him during the entire time Milwaukee had a franchise in the National League. He also stated that an area 50 miles was used by baseball ticket managers as the standard ticket sales generating area. (R. 895-97)

The secondary market was determined to be an additional ring of counties falling entirely or principally within a radius of 100 miles of the central city. Thus Chicago was included in Milwaukee's secondary market. For comparatime purposes, similar market areas were developed for the other National League cities and Atlanta, Dallas-Fort Worth, San Diego and Seattle. The latter four cities were included because they have expressed an interest in becoming National League cities, and Atlanta, of course, is now franchised by the National League.

Milwaukee's secondary market is inflated by the inclusion of Chicago. Mr. Eberly described Milwaukee's close proximity to Chicago as a very favorable attendance factor. He sought to schedule Chicago in Milwaukee on weekends to enhance attendance. In addition to a greater volume of ticket sales, the Cubs series produced a greater sales of the higher-priced box seats. (R. 909-911)

Economic growth and consequently population distribution in the post-war years had been characterized by a particularly rapid industrial growth of the western end of the Manfacturing Belt, which embraces Milwaukee, and by

a virtual flood of movement to the Far West, especially California. (Ex. 240, p. 12)

Obviously the size and rate of growth of the population and the economy of a community are significant factors affecting attendance at spectator sports.

Milwaukee's population of 1,790,300 in 1964 was the sixteenth largest primary market area in the country. (Ex. 240, p. 13) In the National League all other areas were larger except Cincinnati. Houston is only slightly larger; however, only the western cities of Los Angeles, San Francisco and Houston have shown a greater rate of growth from 1950-1964. (Ex. 240, p. 13) Atlanta, which has the twenty-first largest primary market in the country, and a population of 1,378,100, has had an average annual growth rate between 1950-1964 of 3.1%, compared to Milwaukee's 2.4%.

Only the capital city of Washington and Los Angeles (Angels) in the American League have a larger rate of growth. Kansas City in the American League has a rate of growth equal to that of Milwaukee.

When the secondary markets are added, Milwaukee ranks fifth behind New York, Philadelphia, Chicago and Los Angeles. Except for the Dallas-Fort Worth primary market, Milwaukee is the largest primary market without Major League baseball.

The Little report conceded that presently Milwaukee definitely had a greater population concentrated near its stadium and in the fifty mile area than Atlanta has, but

concluded that Atlanta's population in the secondary area was greater. (R. 5918-24, 5922; Ex. 510, p. 1)

During the decade between 1950 and 1960, Milwaukee as grown faster than any of the older, well-established Major League areas of the northwest and midwest; only the western cities and Washington, D. C. have exceeded its rate of growth. Projections for the 1960-1980 period for Milwaukee range from 0.8 to 2.1%. This slackening of the rate of growth is said to be in keeping with the general slowdown in population growth predicted for the nation by the Bureau of Census. Comparable projections for the other Major League areas show that the Milwaukee metropolitan area will remain in the third fastest-growing standard metropolitan statistical area in the National League and the sixth among the seventeen Major League metropolitan areas. (Ex. 240, p. 20) A standard metropolitan statistical area is an area used by the Division of Statistical Standards, U. S. Bureau of the Budget, and used in the United States Census. (Ex. 240, p. 9) The areas consist of a central city with a population of at least 50,000 and the continguous counties. In most instances, these areas are smaller than primary markets.

It is anticipated that sharp declines of growth rate will occur in these cities that have developed more rapidly in recent years especially the West and Southwestern cities and Washington, D. C. Atlanta's growth rate is also expected to decline. Should these projected rates prevail, Milwaukee's population based upon a SMSA will be 1.8 million in 1980 compared to Atlanta's 1.7 million.

Dr. Little was in general agreement because he concluded that if the past growth rates continue, the two cities may be approximately equal in population within 10 to 15 years. (R. 5942-45; Ex. 510, p. 2)

Wisconsin's growth rate during 1960-1980 is expected to grow faster than most states in which there are Major League teams. Only California, Texas, the District of Columbia and Ohio are expected to grow faster. Illinois and Minnesota are expected to follow at rates just slightly less than Wisconsin. (Ex. 240, p. 23)

An important determining element in a market evaluation is the level and distribution of income in an area. For this reason, comparisons of these factors with other Major League cities is important.

In 1963, Milwaukee's per capita income was $2,391, and its household income was $8,108. It therefore ranked ninth and tenth respectively among the 17 Major League areas. Its position in the National League was fifth in both categories. The spread between Milwaukee and those cities having higher per capita and household incomes was not great. For example, in the National League, Chicago, which enjoys the highest per capita and per household income, exceeds Milwaukee by $350 and $1000 respectively. Residents of Los Angeles and San Francisco enjoyed the second and third highest household incomes in 1963 among the Major League cities. Those incomes were $8,478 and $8,437 respectively, as compared to Milwaukee's $8,108. (Ex. 240, Table H, p. 25) In only three Major League areas, Washington, Boston and Minneapolis did the per capita

income grow faster than in the Milwaukee area. Milwaukee ranked third in income growth per household for this period among the National League areas and eighth among all of the Major League areas. (Ex. 240, p. 24) During this period of time Atlanta also enjoyed rapid income growth. Starting with a lower base Atlanta's growth has been greater than any other National League city except Washington.

In reference to concentration of its population in income levels, Milwaukee has neither a high concentration in the very low or very high income levels. In the $6,000 to $10,000 level, Milwaukee had 3.3% more than in any other Major League city and the smallest of all National League cities in the income range below $3,000. Atlanta had 23.3% of its families in its market area earning less than three thousand dollars as compared to Milwaukee's 10.5%. Atlanta's percentage in this category is higher than any Major League area. It also had a lower percentage of its families in the income level between $6,000 and $10,000. The comparable percentages were 28.6% for Atlanta and 42.8% for Milwaukee. (Ex. 240, p. 29)

Employment opportunities have expanded at a rate of 2.3% between 1950 and 1962 in metropolitan Milwaukee. In only three Major League areas have the opportunities expanded at a faster pace. Atlanta, too, has done well with an average rate of 2.9%.

Milwaukee enjoys a diversified industrial base with a substantial portion in the more rapidly developing industries. No Major League baseball area based upon the SMSA standards approaches Milwaukee's record of consistently

low unemployment rates. In November, 1965, the unemployment rate of 2.2% in Milwaukee's metropolitan area was below the rates in the metropolitan areas of all the other Major League cities except Detroit. Milwaukee's rate of unemployment was well below the median of 3.2% of all of these areas. In 1960, which was a year of relatively high unemployment, Milwaukee's rate of 3.7% was lower than in the metropolitan areas of all but one Major League area (Washington, D. C.) and was substantially below the median rate of 5% for the metropolitan areas of all Major League cities. Milwaukee's sound and diversified industrial base helps it to withstand the downward swings of the national business cycle. Atlanta also has enjoyed low unemployment rates. (See Table M, p. 25, Ex. 230)

The Little study concluded that Milwaukee's economy relied heavily upon manufacturing and skilled labor which accounted for its high level of income (R. 5947) but that Atlanta was more diversified and less subject to the business recessions. (R. 5947-5951) Dr. Clark shared Mr. Nathan's opinion that the economy of both communities is growing, and that Atlanta's employment opportunities are presently undergoing a more rapid growth. (R. 5952)

Insofar as the automobile is important to supply the major form of transportation to spectator sports, a high ownership rate is a measure of ability to attend such sports. Milwaukee ranks third in the National League with nearly 80% of its households owning an automobile. Milwaukee Stadium is conveniently located and close to a major expressway interchange of a major interstate highway reach-

ing to the western part of the state and a state expressway reaching to the northern part of the state. The expressway interchange was designed to provide good access to the stadium. The stadium is the fourth largest in the National League and it has a capacity of 44,600. It could be expanded to accommodate 70,000. Atlanta's stadium capacity is 50,890. Eighty-four acres are reserved for parking around the Milwaukee stadium and will accommodate 12,000 passenger automobiles, 250 buses and 50 taxis. The parking lots at the stadium are normally cleared within 45 minutes of the end of the game. In addition there is good public transportation. Four special bus lines are operated to the stadium. It is estimated that 10 to 12% of all spectators travel to the stadium by public transportation. (Ex. 240, p. 42)

Mr. Nathan believes the principal factors affecting attendance are population size, income, league standing, size and quality of the stadium, promotional efforts, closeness of the race, popularity of the players and the novelty of Major League baseball in new cities. (Ex. 240, p. 43)

Both Mr. Nathan and Dr. Clark sought to analyze Milwaukee's support of Major League baseball. Mr. Nathan used the full history of the Braves in Milwaukee; Dr. Clark used only the last five years. The justification of using only the last five years was that in Dr. Clark's opinion:

> ". . . attendance experience more than five years old has little economic relevance in current decisions. The major usefulness of historical attendance data is the determination if there has been a long term upward, downward, or sideways movement in attendance. Av-

eraging attendance of years ago to justify current decisions cannot be justified whether attendance (or sales for an industrial company) is going up or going down. A prolonged down trend in attendance obviously has great significance for the assessment of future prospects, as has the level of attendance in recent years." (Ex. 510, p. 263)

The year of 1965, the "lame duck" season was rejected by Dr. Clark in his analysis. The period selected by Dr. Clark, for the most part, was the period during which the team had lower standings. These years include the period when ownership was apparently somewhat unpopular. (R. 2561)

The average attendance in Milwaukee between 1953 and 1965 was 1,503,972. This was 31% higher than the average for the National League and 52% higher than the average for the American League. Only the Dodgers outdrew the Braves. This is remarkable considering the size of the primary market which the Dodgers enjoyed in New York and in Los Angeles. The Dodgers' average was 1,809,185. (Ex. 240, p. 44) (See Illustration 9, pp. 44, 46, Ex. 240)

No team in the American League outdrew the Braves. The American League average during that period was 991,046.

During this period the Braves averaged 94.4 admissions per hundred population of the primary market area. Using single team cities as a comparison, the Astros (Houston) drew 65, Reds (Cincinnati) 61, Cardinals (St. Louis) 49,

Giants (N. Y., San Francisco) 40, Pirates (Pittsburgh) 31, and Phillies (Philadelphia) 16. The National League average was 22, and the American League average was 21. (Ex. 240, pp. 48-52)

An effort was made by the Nathan Associates to measure how well Milwaukee did in attendance as related to the standings at the end of the season. (Ex. 240, pp. 55-58) A comparison was made only to single team cities. The average first-place team in 1953 to 1965 had an attendance of 82 per 100 population, the first division clubs had an average attendance of 60 per 100 population and the second division clubs had 37 per 100 population. Milwaukee's average of attendance was substantially above the average for the National League in the two years it won the pennant. When it was a first division club and not a pennant winner, its average was substantially above the average for the rest of the League in six years, only slightly above the average in one year and below the average in two years. In one year with a second division club it finished substantially over the average for second division teams. (See Illustration 12, p. 56, Ex. 240)

In 1961, when the Braves fell to fourth place in the League, the lowest since moving to Milwaukee, only the Cincinnati Reds, who were in first place, topped the Braves attendance on a per capita basis. In 1962 Milwaukee fell to fifth place; yet again only the Cincinnati Reds, who were in third place, topped Milwaukee's attendance per capita.

In 1963 when the Braves were in sixth place, only two teams, the St. Louis Cardinals which finished second and

the Cincinnati Reds which finished fifth topped Milwaukee's per capita attendance.

In 1964 when Miwaukee was in fifth place its attendance per capita was topped only by the Cincinnati Reds who finished second.

For the period 1961-1965, Milwaukee's attendance averaged 47 per 100 population as compared to the 36 per 100 for the average National League one team area. (Ex. 240, p. 57) If a comparison is made with American League cities, Milwaukee's showing is even better. (See Table Q, p. 58, Ex. 240)

Mr. Nathan disputed the contentions that Milwaukee was a poor sports town because it had lost the Miller Open Golf Tournament, professional basketball to St. Louis, football had been abolished at Marquette University, the attendance for the Milwaukee Classic Holiday Basketball Tournament was low, and that ice hockey had left the city. (R. 2795-97) In Mr. Nathan's opinion Milwaukee is a good baseball town. Its people are active in all forms of sports and show great interest in spectator sports. In Milwaukee County there were 84 franchised baseball leagues with 17,000 players in programs supervised by the County Park Commission. Nearly one million spectators attended these games. Milwaukee is the home of the American Bowling Congress and bowling ranks high as a winter sport in the area. The Bowling Congress reported 26,000 women players in the season of 1964-65. (Ex. 240, pp. 59-61)

The average Milwaukee family spends $8.49 on sport-

ing events during the year as compared to the national average of $5.38.

The principal conclusions of Dr. Clark's studies are that "teams in the smaller cities in either league must plan on attendance of under one million, going well under that level with second division finishes and going over that level for a pennant winner, or possibly for a contended club in an exciting race; and that radio and television income has grown in importance to the point where it is second only to admissions revenue as the source of income for baseball clubs generally." (Ex. 510, pp. 2-6)

Although a direct identifiable coefficient of correlation cannot be developed between attendance and the various demographic and economic data considered, such forces and facts are operative and important factors influencing the market. (See Nathan, R. 1122 and Clark Ex. 510, p. 7)

The conclusions of Dr. Clark do not preclude a baseball club in a community of the size of Milwaukee from operating profitably.

The defendants maintain that the relocation of the Braves from Milwaukee to Atlanta was economically prudent.

Mr. Giles at one time advised another owner that an absence of a definite commitment to remain in a city does not mean that a club is free to transfer its location at will and that the changing of a club's location is regarded by the League as a serious matter not to be undertaken without good reason acceptable to its members. He stated that

the National League was most reluctant to approve a transfer which deprived a city of its immediate area of a Major League baseball team.* (R. 2321-22)

When asked whether he thought it was fair to the public in Milwaukee and Wisconsin to abandon Milwaukee under the circumstances, he stated that they had done more for baseball and the National League even though they may have hurt the feelings of some people in Milwaukee and that it was compensating to put baseball in an area which had been deprived of Major League baseball. He agreed that the transfer of the franchise from Milwaukee did more than hurt feelings because he recognized Major League club is a definite asset to the community and its removal has a detrimental effect upon the local economy. Mr. Giles stated that Milwaukee was not abandoned because it is still in the Chicago area. (R. 2342-46)

In view of Mr. Eberly's testimony that ticket managers generally accepted a 50-mile radius as the generating area for attendance Chicago cannot be considered to be in Milwaukee's immediate area for baseball purposes. (R. 895-97) The proximity of Chicago to Milwaukee did not deter the league when the Boston Braves moved to Milwaukee in 1953.

The consideration in a determination as to whether or not a transfer from one city to another was warranted were summarized by Mr. Giles to include "largely what effect

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*In the preface to a book entitled **The National League Story** he stated, "I have never heard a Major League club owner or official express a view that a city which has the physical ability to support big-league baseball should be deprived of it." (R. 3692-93, 3702)

it will have on the League and whether we are going into a better city, whether we are going into a better area, whether the League will be stronger, whether baseball will be better served by the transfer." (R. 2242) In answer to a direct question as to whether any consideration was given to the community from which the franchise is being transferred he responded by saying that in his experience Major League franchises were very desirable. (R. 2243) Later on he acknowledge that there was no discussion concerning any responsibility on the part of a franchise holder to determine whether or not local ownership was interested in continuing the franchise before a request for a transfer of the franchise was made. (R. 2252) He also stated that he thought that when Mr. McHale inquired about transferring to Atlanta he made no suggestion that the owner of a franchise in a city has any responsibilities to stay there. (R. 2231) There is no such requirement. (R. 2251, also see R. 5300, 5618)

League rules provide no procedure or machinery to determine the benefits and detriments to the public associated with a transfer of a franchise. There is no procedure for giving notice to a community that a league intends to abandon. (R. 2349-50)

When asked whether the "White Paper" was given serious consideration by the National League members and himself, Mr. Giles answered that it was probably a factor, but that he could not say what influence it had because the final vote was taken in Arizona. (R. 2357)

No stenographic record was made of the proceedings. No personal investigation or inspection of the City of Atlanta's potential economically or otherwise was made. (R. 2230) Mr. Giles relied upon some personal views on the matter based upon Atlanta's application when the Continental League was organized in 1960, but he made no investigation as to its present capacity. (R. 2230-31) The only information concerning these matters was that which was contained in the "White Paper." (R. 2282)* No analysis was made concerning the financial status of the Braves. (R. 2280)

Mr. Devine was not acquainted with any specific facts or economic studies concerning the City of Atlanta or its environs other than what he learned from publications by people who were presumably acquainted in the financial and business field. That Atlanta was a "moving community." (R. 4869) Mr. Stoneham said that he took into consideration all the factors that were known to him without being specific about it and that he had every reason to believe the statements of the Braves' owners. (R. 3713) Mr. Giles believes that Milwaukee would not support a Major League baseball club presently because of the general atmosphere which he felt existed. He said, ". . . when you are in baseball as long as I have been, you sort of feel things and sense them. You may not always be right, but you do that. I have certain feelings about things that I have to give as my opinion without a survey, without being technical." (R. 3661-62) He concluded, "We felt the Mil-

*When Frick saw the document his remark was to the effect that, "This is not quite what I expected." (R. 377)

waukee group was a good group, good partners in the league, and they asked for permission to move, and we didn't want to indicate or certainly I didn't want to indicate that they should sell it to somebody else or keep it anywhere." (R. 2254)

Mr. Giles did not recall that the County's offer to revise the lease with the Braves was mentioned except as subsequently stated by Mr. Grobschmidt. Mr. Giles believed that Mr. McHale had said something about a $525,000 offer for a television contract. (R. 2286-88) Mr. Giles further stated that he knew the attendance had gone down from a great peak but did not analyze the attendance from the point that it started to increase. He was unaware of the fact that the Braves had sold the third largest number of season tickets in 1964 in the National League. (R. 4429-4431)

The American League had employed business consultants to study the various cities and the potentials thereof when it considered expansion. (R. 2048)

11.) Mr. Allan H. Selig and Mr. Edmund B. Fitzgerald prepared the prospectus of the Milwaukee Brewers Baseball Club, Inc. (Exhibit 145) projecting the operation of an expansion club in Milwaukee. Sources of information investigated by Mr. Selig preparatory to preparing the document consisted of the historical experiences of the other expansion teams created in 1960 and 1961, documentary information which Mr. Fitzgerald acquired while he was a director of the Braves giving historical information of the income and expense structure of the Braves,

a special project prepared by Mr. Delforge, with the consent of Mr. McHale, giving a very detailed historical analysis of the Braves' operations here for five years and information provided by the management of the Los Angeles Angels, with whom Mr. Selig conferred for several days. (R. 1373-1377) The Angels gave him their starting up costs, their general costs, the initial player draft and what their organizational setup had been in the first year or year and a half. The prospectus was carefully prepared and furnishes a complete organizational proposal for the operation of an expansion team.

It was submitted to ten men who became subscribers to the organization, each agreeing orally to pay in $150,000 to equity capital. (R. 1418, 1419) The First Wisconsin National Bank of Milwaukee, under date of November 29th, 1965, approved a loan to be made to the Milwaukee Brewers Baseball Club, Inc., expiring December 31st, 1966, conditioned upon the granting of a franchise, the signing of contracts satisfactory to the bank regarding stadium rental, concessions, and radio and TV and the payment of the equity capital of at least $1,500,000 by the group. (Ex. 146) The capitalization of $3,000,000 was considered adequate based on the initial amount of monies that each of the four expansion clubs paid to the league for ballplayers in 1960 in the American League and 1961 in the National League, and using that and again getting the Angels' historical experience and going down a checklist of expenses, there were no minor league indemnification payments to make, no minor league territory to buy, the stadium was a ready made facility and there were no important capital

requirements as far as playing facility was concerned. In addition to that, Mr. Selig testified that the club had a commitment from another source for $1,500,000, two concession companies, one in the form of a letter of intent in the area of $1,000,000, (Ex. 267) the other oral.

Mr. Fitzgerald, Mr. Robert A. Uihlein, Jr., Mr. Duane Bowman and Mr. Selig appeared on behalf of the Milwaukee Brewers at the National League meeting at Miami Beach in December, 1965, where a presentation was made in support of the club's application for a franchise. The presentation, Exhibit 23, was read, biographical sketches of each of the members of the Brewers group and a book entitled "Milwaukee, Major League City" were distributed. (R. 1434-1436) The presentation covered the matter of the unfriendly press and made a comparison of the space devoted to baseball in the Milwaukee Journal and the New York Times during some sample dates in July, 1965, showing a preponderant balance of newspaper coverage in favor of Milwaukee and noting that New York had two Major League baseball teams during that period while Milwaukee had only one. The presentation also covered the radio-TV market and the question of loss of fans to the Minnesota Twins which was estimated at less than five per cent in total market potential loss. It should be noted that at the time the Angels' franchise was granted, it had not a single person on its payroll, (R. 5867) it had no manager, (R. 5867) no players under contract, (R. 5888) no spring training site, (R. 5888) no concession contracts signed, (R. 5889) no farm club, (R. 5887) and an original capitalization of $3,000,000. (R. 5889)

That same day the League issued a press release referring to the applications for a franchise for Milwaukee made by Milwaukee County and the Milwaukee Brewers Baseball Club, Inc. and an application for a franchise in the Dallas-Fort Worth metropolitan area made by North Texas Baseball Club and announced; "It is the considered judgment of the League that none of the applicants would be able to operate a franchise in 1966 and that League expansion in 1966 is not feasible." (Ex. 49)

12.) The several owners whose depositions were read upon this trial are substantially in agreement that the Major Leagues will expand. They assert, however, that expansion is not feasible at the present time. They say there is a shortage of players. The Court is satisfied, however, from the testimony of former Commissioner Ford C. Frick, Mr. William L. (Bill) Veeck,* Mr. Bragan, field manager of the Braves, and also from the testimony of Mr. Giles and Mr. O'Malley, that there are sufficient baseball players to stock a team in Milwaukee.

Mr. Frick testified that he was an advocate of expansion since the day he got into the Commissioner's office, even before, as President of the National League, when the Pacific Coast League was interested in coming in many years ago; that he advocated a well-organized and well-thought out and planned expansion program, increasing

*William L. (Bill) Veeck, presently a syndicated sports columnist, has been in the business of baseball all of his life in one capacity or another. He has been an owner of the Milwaukee Brewers, Cleveland Indians, St. Louis Browns, and Chicago White Sox. He also has been associated with the Chicago Cubs and is the author of two books dealing with baseball and which are entitled "Veeck as in Wreck" and "The Hustlers Handbook."

the number of clubs (R. 566); that he advocated two twelve club leagues because he thought it was more practical; that in 1960 he was an advocate of expansion; that the expansion of the Major Leagues is inevitable (R. 569); in December of 1960 Mr. Frick predicted that Major League baseball will have expanded to twenty-four teams and perhaps three leagues by 1964. (R. 568) On August 18th, 1965, he formulated an expansion plan which was forwarded to Mr. John Galbreath, President of the Pittsburgh club, including provisions for procedure, financial obligation, probationary period and player procurement. (Ex. 191) He also testified that a very careful plan of expansion had been drafted back in 1960 at the time of the Continental League interest in Major League baseball which provided for the entrance of four teams in the immediate future and within four years from the date of that plan, some time around 1965 or 1966, the addition of four more teams into baseball. The 1960 plan, however, just never developed. (R. 637, 638) He did not think about whether the move from Washington to Minnesota was in the best interest of baseball but he did go to the Washington club and the Washington people in the American League "and by persuasion rather than by drawing the law I said, 'Now, this is all wrong. If you've got expansion, you have got a place for another franchise, you had better keep it in Washington.'" He used persuasion, since they had a franchise available, to make sure that it went to Washington. (R. 609, 611) (See Exs. 204, 205, 206, 208, 209, 211, 213, 215, 216, 217, 219, 222) Confirming the statement in his letter to Mr. R. R. M. Carpenter, Jr., President of the Philadelphia

Phillies, dated November 17th, 1958, (Ex. 204) Mr. Frick testified that he disagreed with those who argued that a dearth of playing material makes expansion impossible. He testified that the expansion procedure would be simple and that he was still of the opinion, as expressed in the letter, "If we attempt at this time to be completely arbitrary; if we refuse to consider the interest of the public in the development of our game; if we insist on being completely monopolistic in our organization, we will lose all the public esteem which presently exists." It was in this letter that Mr. Frick stated: "We will be the victims for every crackpot congressman in the country and we will, by our own shortcomings, pave the way for the breakdown of our structure." (R. 638, 642)

Mr. William L. Veeck testified in connection with plaintiff's application for preliminary injunctive relief in December, 1965. He was cross examined by the defendants at the time and as he is not a resident of the State of Wisconsin the Court permitted the record of his testimony in December of 1965 to be incorporated in and made part of the record in this case. (Sec. 325.31, Stats.) In his testimony Mr. Veeck gave his opinion that expansion of the National League in 1966 was feasible. (R. 1946, 1947) It is true that the Court must consider this testimony in light of the time it was given—some three and a half months ago. The witness did testify pertinently, however, to the mechanics of expansion. He was one of the eight club owners of the American League at the time of the 1960 expansion. He testified that the league owners held meetings to discuss first the feasibility of expanding in general,

on November 16th, 1960 decided to expand, submitted the player lists to the President of the league on the 18th of November. The Washington club franchise was awarded on November 17th; the Angels' franchise on December 6th. On the 14th day of December the two new expanded clubs, the Washington ball club and the Los Angeles ball club, made their selections of personnel from the various lists. He estimated it took them about four hours to do that. Each club reserved twenty-five players from their roster of forty players and then the two expansion clubs were permitted to select alternately a maximum of seven players from every two clubs. (R. 1953-1957) In order to provide personnel for the newly expanded clubs each team reserved twenty-five players from their list of forty making available the other fifteen for selection at $75,000 a choice; the expansion clubs selected alternately three and four players from the available list. This was the basic stocking of the newly expanded teams. (R. 1955) The witness testified that the White Sox had suggested a different plan for expansion which, in their estimation, would give the newly expanded teams a higher caliber player and he described that plan. (R. 1960) Both the Los Angeles Angels and the Washington Senators fielded a team on the opening day of the 1961 season. (R. 1956)[3] Expansion in the National League took place in 1962 with two new clubs, the New York Mets and the Houston Astros. The witness testified that there were qualified persons available to select players from the available lists. (R. 1962, 1963) The witness described a plan discussed on numerous occasions at Major League meetings which would enable a club to put

a comparable team, nearly comparable to the Braves, back on the field. This, he said, would involve a reduction of the players on the control limit from twenty-five to twenty-three. (R. 1968, 1969) He testified that expansion of one club in one league could be done but that it isn't the most practical way to operate as that there would always be one club that wasn't playing, that historically football leagues, basketball leagues, and hockey leagues have operated with uneven numbered clubs. (R. 1969, 1970) It was his opinion that expansion might improve competition. (R. 1973) The witness thought that a capital structure of $4,500,000 would be an adequate amount to field an expansion club—depending upon what prices the ballplayers brought, (R. 1978) that the time for fielding an expansion team and the time for fielding an existing team which is transferred varied only insofar as affected by procurement of playing talent, and at the present time in his opinion there are sufficient number of players of professional caliber to provide for the player need of expansion clubs. (R. 1980, 1981) On cross examination the witness testified that it is not highly, greatly or real practical to expand by one club, (R. 2025, 2056, 2057) that it is easier to expand to a schedule for eleven teams than for nine, (R. 2031, 2032) and that he made the following statement in his book entitled "Veeck as in Wreck": "With Washington already voted in we had a nine team league. You cannot schedule nine teams." (R. 2031)

Mr. Bragan admitted that he was accurately quoted and reported in two newspaper articles, one published in the Milwaukee Journal under date of May 8th, 1965, (Ex.

364) and the other published in the Milwaukee Sentinel under date of February 11th, 1965. (Ex. 365) In these articles he outlines plans for expansion, admits to a sufficiency of players, suggests a reduction in player rosters (down to twenty-one or twenty), and names players who made good in the Major Leagues because of the 1961-62 expansion. (R. 2597, 2598-2600, 2605, 2606, 2607, 2608) In the Journal article Mr. Bragan is quoted as saying: "There's more than enough talent for expansion. * * * There are Major League players playing minor league ball today.

"Where would Ron Hunt be if it wasn't for expansion? Or Jim Fregosi or Dean Chance and a lot of others? In the minors, that's where."

True, expansion to eleven teams would require an adjustment in scheduling. While Mr. Bruton's proposed schedule was certainly not perfected, his explanation and testimony sufficiently show that a practical schedule can be arranged. The proposals made by him would be similar to those now in effect in the National League.

13.) The court has previously indicated that in its opinion from the record herein Organized Baseball is a monopoly. It's economic control is achieved principally by agreements (relating to the National League) viz., (a) the Constitution and Rules of the National League of Professional Baseball Clubs, (b) the National League Agreement to which each Major League and all member leagues are parties, and (c) the Major League Rules promulgated

pursuant to the agreement and binding upon both leagues, their member clubs and players.

By the practical working of these interrelated rules and agreements the number of competitors in Organized Baseball is limited; not only is the number of competitors limited to the present members of each league but each member of the National League has, as among the other members of the League, exclusive territorial rights; and virtual complete control is effected over the supply of players with sufficient talent to play Major League baseball.

14.) Defendants maintain that the plaintiff has failed to establish the allegations of the complaint by clear and convincing evidence, citing *Scheit v. Duffy*, 248 Wis. 174, 176, 21 N. W. (2d) 257 (1945), where the plaintiff alleged a conspiracy to evict him from his home. There the court said that in order to prevail, plaintiff must produce testimony that defendants actively acted in concert and jointly assented to the unlawful enterprise and quoted from 15 C. J. S. Conspiracy, page 1047, sec. 30, where it is said: "'Disconnected circumstances, any one of which, or all of which, are just as consistent with a lawful purpose as with an unlawful undertaking are insufficient to establish a conspiracy.'" The court also pointed out that of necessity a finding of conspiracy may be inferred from established facts and circumstances, but that there must be some basis on which a finding of the conspiracy may rest; that there must be more than a mere suspicion or conjecture.

The court is also referred to *Roberts v. Saukville Canning Co.*, 250 Wis. 112, 116, 26 N. W. (2d) 145 (1946),

where it is said: "A claim of conspiracy is a challenging allegation, but in a civil action unless the conspiracy is established by clear and convincing evidence and some act pursuant to a formed conspiracy causing damage is proven, no cause of action exists."

In *Lange v. Heckel*, 171 Wis. 59, 64, 175 N. W. 788 (1920), an action for damages resulting from a conspiracy to defraud, the court said: "We scarcely need refer to the fact that proof of conspiracy almost *ex necessitate* must rest upon circumstantial evidence."

In *Wachowski v. Lutz*, 184 Wis. 584, 594, 201 N. W. 234 (1924), which was an action for fraud, the court said: "We have, then, an unlawful agreement on the part of the defendants. It matters not whether the purpose thereof was accomplished by lawful or unlawful means. But it seems clear that, even though the purpose were lawful, the means by which the end was accomplished cannot be judicially sanctioned as lawful." There the court quoted from *Patnode v. Westenhaver*, 114 Wis. 460, 474, 90 N. W. 467, as follows:

> "'A mere tacit understanding between conspirators to work to a common purpose is all that is essential to a guilty, actionable combination. . . . Mutuality in the undertaking may be secured without any express agreement and without a spoken or written word between the conspirators or a meeting of the members of the combine, or their, even, all knowing each other; or the precise thing to be accomplished or plans for its accomplishment, either in a general way or in detail, being distinctly stated by any member of the combine

to any other member. If there is a meeting of minds, brought about in any way, to accomplish the common purpose, the essentials of a guilty combination are all satisfied.' "

Plaintiff maintains that the rules governing conspiracy under the Federal Antitrust Laws apply to antitrust actions under Wisconsin law. Even if we were not to accept that statement, it would appear that the State rules are in accord with the Federal rules of evidence. In *United States v. Schrader's Son*, 252 U. S. 85, the court held it to be well established that proof in an antitrust conspiracy case, proof of a formal agreement is unnecessary, that with the law otherwise such conspiracies would flourish and profit rather than punishment would be the reward.

See also *C-O-2 Fire Equipment Co. v. United States*, 197 F. (2d) 489.

No formal agreement is necessary to constitute the unlawful conspiracy, nor is it material to prove that the ultimate object of the combination is to restrain trade, if it in fact does unreasonably do so. *Wm. Goldman Theatres v. Loew's, Inc.*, 150 F. (2d) 738, 743 (1945); *Apex Hosiery Co. v. Leader*, 310 U. S. 469 (1939); *Hitchman Coal & Coke Co. v. Mitchell*, 225 U. S. 229 (1916); *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211 (1899).

In *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 489, the court said:

"The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act did not define them. In consequence of the

vagueness of this language * * * the courts have been left to give content to the staute * * *."

In *American Tobacco Co. v. United States*, 328 U. S. 781, 809, 810, it was said:

> "It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they become within its prohibition. No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose. Where the conspiracy is proved, as here, from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of an intent to exercise the power of exclusion acquired through that conspiracy. The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in an exchange of words."

See also *Paramount Famous Lasky Corporation v. United States*, 282 U. S. 30 (1930).

15.) Today the law generally deals with monopolistic enterprises in one of two ways: either it declares the monopoly illegal and attempts to restore competitive conditions, or else it declares the monopoly to be a public utility

and by statute empowers an administrative body to regulate its conduct in the public interest.

Munn v. Illinois, 94 U. S. 113 (1876) involved the question of whether the state Legislature could set the maximum rate to be charged by a group of private firms having a monopoly on the grain elevating facilities in Chicago. The court there held that the grain elevator operators must be considered to have devoted their property to a public use because they had achieved a monopoly of the business. The court made it clear, however, that in matters which affect the public interest the courts must determine what is reasonable in the absence of statutory regulations on the subject. The decision made it clear that the power to regulate stems solely from the fact of monopoly, not from the existence of the grant of some special privilege by the state, that any monopoly *de facto* or *de jure* had to deal on a reasonable basis. There the court said: "Property does become clothed with the public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control." In *United States v. Terminal Railroad Association*, 224 U. S. 383 (1912), 14 of 24 railroads converging at St. Louis organized an association for the purpose of acquiring all terminal facilities

for the benefit of the association and such other companies as they might thereafter admit by unanimous consent. The court found the terminal facility to be a natural monopoly which the court held "constitutes a most obvious reason why such a unified system is an obstacle, a hindrance and a restriction upon interstate commerce, unless it is the impartial agent of all who, owing to conditions, are under such compulsion, as here exists, to use its facilities." It was held to be in violation of the Sherman Antitrust Act because it did not act impartially but engaged in discriminatory practices. Because the violation grew out of the administrative conditions which could be eliminated and there was obvious advantage to the unification of the terminals, the court took corrective means so as to preserve to the public a system of great public advantage. The violation of the Sherman Act was only a jurisdictional prerequisite to the court's exercise of traditional common law powers over a monopoly. See *Silver v. New York Stock Exchange*, 373 U. S. 341 (1962). In *International Salt Co. v. U. S.*, 332 U. S. 392 (1947) the court said that a public interest served by equity suits is that they effectively pry open to competition a market that has been closed by defendants illegal restraints. Other instances of courts outlawing unreasonable refusals to deal by monopolies, while not destroying the monopoly itself, include *United States v. National Lead Co.*, 332 U. S. 319 (1946) ("The essential consideration is that the remedy shall be as effective and fair as possible in preventing continued or future violations of the antitrust act in the light of the facts of the particular case."); *Gamco, Inc. v. Provi-*

dence Fruit and Produce Bldg., Inc., 194 F. 2d 484, 487-488 (1st Cir. 1952); *American Federation of Tobacco Growers, Inc. v. Neal*, 183 F. 2d 869 (4th Cir. 1950); *Nebbia v. New York*, 291 U. S. 502.

Before the modern regulatory and antitrust statutes, the common law had declared certain businesses, because they were monopolies, to be "effected with the public interest" and therefore subject to judicially imposed rules of reasonable behavior. See *Wyman, Public Callings And The Trust Problem*, 17 Harv. L. Rev. 156, 227-228 (1904).

The early case of *Shepard v. The Milwaukee Gas Light Company*, 6 Wis. 526 (1858) was an action for damages brought by plaintiff against the defendant chartered company having the exclusive right to manufacture and sell gas for the purpose of lighting the City of Milwaukee. Plaintiff claimed that the defendant refused to furnish him with gas unless he signed an agreement to take the product according to the terms and conditions contained in the rules and regulations of the company. The court noted that the product could not be procured from any other than the particular corporation and held that the very fact of this exclusive right conferred upon the company to manufacture and sell gas in the city would imply an obligation on the part of the company to furnish the city and citizens with a reasonable supply on reasonable terms. Having made such determination, the remaining question concerned the reasonableness of the defendant's regulations.

16.) Plaintiff maintains that it is established in the

record that the defendants have violated the State law in at least four respects.

(a) First, it is said that the defendants are engaged in a group boycott and concerted refusal to deal which illegally restrains trade and commerce in Wisconsin. In support of this statement they cite *Washington State Bowling Proprietors' Assn., Inc. v. Pacific Lanes, Inc.*, C. C. H. 1966 Trade Cases (Par. 71,685) (9th Cir. 1966). Here the plaintiff, an independent owner-operator of a bowling establishment brought an action against other bowling establishments in Tacoma, Washington, and the state and local trade associations of bowling proprietors in which they were members. It was charged that the defendants were engaged in an unlawful conspiracy to restrain and monopolize trade and commerce in violation of the Sherman Act. Specifically it was charged that the defendants had agreed to establish bowling tournaments which were open to bowlers who agreed to restrict their league and tournament bowling to establishments that were members of the three bowling proprietors' associations. They had declared ineligible for the tournament any bowler who had done any organized bowling in a non-member establishment. These restrictions had been carried out by the adoption of eligibility rules. The basis of the complaint was that the actual effect of the agreements, rules and practices was to deprive non-member establishments of the patronage of persons who wished to engage in organized bowling, to enforce a boycott against non-members, and thereby monopolize and suppress competition in the bowling industry. The complaint also charged defendants

with limiting and restricting the number and size of bowling establishments, fixing prices charged for bowling and all of the conditions under which bowling was carried on. In upholding a jury verdict finding illegal the eligibility rule of the defendant bowling associations, the court said that the rule that group boycotts are *per se* violations of the Sherman Act applied not only to commercial boycotts, but also to refusals to deal with customers. The court said:

> "Appellants' objections, both preceding and following the charge to the jury, went to the necessity for instructions that appellants had the right to place restrictions on their business which were designed to prevent cheating such as 'sandbagging' or other abuses, even though such restrictions might incidentally restrict commerce. Presumably such instructions would have indicated that the restrictions were designed to promote the sport of bowling rather than to constitute a boycott. We have reviewed the record in regard to these objections and find ourselves in agreement with the statements of the trial judge in his memorandum decision (C. T. 237-42). He held that the evidence in the case did not justify or support such proposed instructions. Even assuming that abuses in the sport existed, it has been established since the case of *Fashion Originators' Guild v. Federal Trade Commission*, 312 U. S. 457 (1941) that such circumstances do not justify a private association passing regulations to deal with the problem when their effect is to restrain or regulate interstate commerce."

Similarly it was held in *Washington Professional Basketball Corp. v. National Basketball Assn.*, C. C. H. Trade Cases, Par. 72,557 (U. S. D. C. N. Y.) (1956), that

a professional basketball company which alleged that it was denied participation in the business of professional basketball by an alleged illegal conspiracy between a basketball association and others was held to have a standing to sue for damages. Even though the company never owned a playing team, the company's complaint alleged that it did everything required of it to acquire a professional basketball team and was prevented from completing that acquisition solely by the defendant's alleged illegal conspiracy.

In reliance on *Klor's v. Broadway-Hale Stores*, 359 U. S. 207 (1959), defendants assert that an illegal boycott contemplates coercive action against parties outside the group. But the restraint of trade and commerce exists regardless of the reason for the refusal to deal. Whatever the reason for the boycott it is the restraint of trade brought about by the restriction on competition that is prohibited by the antitrust laws. In *A. B. Becken Co. v. Gemex Corp.*, 272 F. (2d) 1 (7th Cir., 1959), the court said: "If accompanied by unlawful conduct or agreement, or conceived in monopolistic purpose or market control, even individual sellers' refusals to deal have transgressed the Act."

(b) The defendants are a monopoly whose refusal to deal for the purpose of extending and protecting the monopoly violates the antitrust laws.

A showing of specific intent so to monopolize or abuse monopoly power is not necessary to prove a violation of the antitrust laws. *U. S. v. Griffith*, 334 U. S. 100 (1948).

In *Poller v. Columbia Broadcasting System, Inc.*, 368 U. S. 464 (1962), an action for treble damages based on

alleged violations of the restraint of trade and monopoly sections of the Sherman law, the petitioner, Poller, alleged that CBS, pursuant to a conspiracy to eliminate his television station from the Milwaukee market and to destroy UHF broadcasting, had terminated its renewable affiliation contract with television station WCAN. There the court said:

> "It may be that CBS by independent action could have exercised its granted right to cancel WCAN's affiliation upon six months' notice and independently purchased its own outlet in Milwaukee. However, if such a cancellation and purchase were part and parcel of unlawful conduct or agreement with others or were conceived in a purpose to unreasonably restrain trade, control a market, or monopolize, then such conduct might well run afoul of the Sherman Law. See *Times-Picayune Pub. Co. v. United States*, 345 U. S. 594, 624-625 (1953); *Eastman Kodak Co. v. Southern Materials Co.*, 273 U. S. 359, 375 (1927). Poller alleges and the affidavits, depositions, and exhibits indicate much more than the free exercise by CBS of the granted right of cancellation. A conspiracy is alleged to restrain trade in the Milwaukee television market; to eliminate WCAN from that market; to secure its facilities at depressed prices; and to occupy the UHF band in that market exclusively. The right of cancellation was merely one of the means used to effectuate this conspiracy. * * *"

See *United States v. Aluminum Company of America*, 148 F. (2d) 416 (2d Cir., 1945); *United States v. American Tobacco Co.*, 221 U. S. 106 (1911).

(c) Even if the shutdown of baseball in Milwaukee was not intended to restrain trade, the decisions to transfer, not to expand, and to refuse to deal with the Milwaukee market would nevertheless be illegal efforts to protect and extend the power of an existing monopoly.

In *State v. Lewis and Leidersdorf*, 201 Wis. 543, 550, 230 N. W. 692, it was held that the third sentence of section 133.01, Stats., corresponds to section 2 of the Sherman Act. There the court defined monopolizing, generally speaking, as concentrating business in the hands of one or a few.

In *American Tobacco Co. v. United States*, 328 U. S. 781 (1946), wherein petitioners were convicted of violating sections 1 and 2 of the Sherman Act, the court granted certiorari limited to the question whether actual exclusion of competitors is necessary to the crime of monopolization under section 2 of the Sherman Act and the court held "that such actual exclusion of competitors is not necessary to that crime. * * *" There the court said:

> "A correct interpretation of the statute and of the authorities makes it the crime of monopolizing, under section 2 of the Sherman Act, for parties, as in these cases, to combine or conspire to acquire or maintain the power to exclude competitors from any part of the trade or commerce among the several states or with foreign nations, provided they also have such a power that they are able, as a group, to exclude actual or potential competition from the field and provided that they have the intent and purpose to exercise that power. See *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 226, n. 59 and authorities cited."

* * *

"* * * Neither proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors is essential to sustain a charge of monopolization under the Sherman Act."

* * *

"* * * In *Northern Securities Co. v. United States*, 193 U. S. 197, in referring to the holding company device there in issue, this Court said that the mere existence of such a combination and the power acquired by the holding company as its trustee constituted a menace to and a direct restraint upon that freedom of commerce which Congress intended to recognize and protect and which the public is entitled to have protected. * * * The authorities support the view that the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so. * * *".

See *United States v. American Tobacco Co., supra.*

(d) Even if Organized Baseball is a self-regulating monopoly enjoying some kind of privileged position under the antitrust laws, actions charged are nevertheless actionable restraints of trade and abuse of monopoly power. The violation here concerns the abuse by the monopoly of its power in a manner which will have the effect to restrain trade and commerce within this State. The assumption of the reasonableness of the agreements by which organized baseball maintains its internal control, as those agreements affect people within the structure of Organized Base-

ball, do not sanction the monopoly to restrain trade and commerce outside of baseball. Supporting cases are those involving monopolies which are affirmatively exempted by law from application of the antitrust laws. See *United States v. Masonite Corporation*, 316 U. S. 265 (1942); *United States v. Line Material Co.*, 333 U. S. 287 (1948); *United States v. Singer Manufacturing Co.*, 374 U. S. 174 (1963); *Allen Bradley Co. v. Local Union No. 3*, 325 U. S. 797 (1945); *United Mine Workers v. Pennington*, 33 U. S. L. Week 4520 (1965).

Reference is also made to *Maryland and Virginia Milk Producers Assn., Inc. v. United States*, 362 U. S. 458 (1960), where it was held that the power granted milk producers by the Capper-Volstead Act to conduct their affairs collectively, "* * * did not leave cooperatives free to engage in practices against other persons in order to monopolize trade, or restrain and suppress competition. * * *"

See also *Silver v. New York Stock Exchange*, *supra*, wherein it is said:

> "Our decision today recognizes and holds that that statute affords no justification for anticompetitive collective action taken without according fair procedures. Congress in effecting a scheme of self-regulation designed to insure fair dealing cannot be thought to have sanctioned and protected self-regulative activity when carried out in a fundamentally unfair manner.
>
> "The basic nature of the rights which we hold to be required under the antitrust laws in the circumstances of today's decision is indicated by the fact that carried out in a fundamentally unfair manner.

tions have, under various legal principles, all been required to afford notice, a hearing, and an opportunity to answer charges to one who is about to be denied a valuable right. Citing cases."

See also *H. B. K. Willis v. Santa Ana Community Hospital Ass'n.*, Trade Cases, 1962, Par. 70,328 (D. C. App. Calif., March 29, 1962).

17.) Injunctive relief to prevent the execution of the purposes of a contract or combination in restraint of trade is provided for in Section 133.02 Stats. Section 268.01 Stats. provides that an injunction may be the final judgment in an action.

In *State v. Coubal*, 248 Wis. 247, 258, 21 N. W. 2d 381. The court noted that the constitutionality of Sections 133.01 and 133.02 Stats., relating to forfeitures and injunctions under the state antitrust law had never been questioned. The court's power to enjoin in an action for injunction against a combination in restraint of trade under the state law was recognized in *State v. P. Lorillard Co., supra. State v. Allied Chemical and Dye Corp.*, 9 Wis. 2d 290, 101 N. W. 2d 133 was brought for injunctive relief.

Similarly the Sherman Act provides that the several district courts of the United States are invested with jurisdiction to prevent and restrain violations of the Sherman Act. See *United States v. National Lead Company, supra; United States v. U. S. Gypsum Co.*, 340 U. S. 76 (1950).

In *United States v. National Lead Company, supra* the court said "the essential consideration is that the remedy shall be as effective and fair as possible in preventing con-

tinued or future violations of the Antitrust Act in the light of the facts of the particular case."

The power to issue mandatory injunctions is recognized as an appropriate function of courts of equity in *St. Hyacinth Congregation v. Borucki*, 141 Wis. 205, 124 N. W. 284 (1910). See also *Bouchard v. Zetley*, 196 Wis. 635, 220 N. W. 209 (1928). The question of the Court's authority to render injunctive relief which must be given effect outside the territorial jurisdiction of the Court was presented and argued in connection with the defendants' application for a vacation of the temporary restraining order. Additionally, the Court has been referred to the *United States v. First National City Bank*, 379 U. S. 378 (1965); *Madden v. Rosseter*, 114 Misc. 416, 187 N. Y. Supp. 642, affirmed, 196 App. Div. 891, 187 N. Y. Supp. 943 (1921), *Dubinsky v. Blue Dale Dress Co. Inc.*, 162 Misc. 177, 292 N. Y. Supp. 898 (1936), *Kempson v. Kempson*, 63 N. J. Equity 783, 52 Atl. 360 (1902).

18.) In *United States v. DuPont and Co.*, 366 U. S. 316, 1960, the Court said: "The key to the whole question of an antitrust remedy is, of course, the discovery of measures effective to restore competition. Courts are not authorized in civil proceedings to punish antitrust violators and relief must not be punitive. But Courts are authorized, indeed required, to decree relief effective to redress the violations whatever the adverse effect of such decree on private interests. *United States v. Holophane Co. Inc.*, 119 F. Supp. 114 (S. D. Ohio, 1954), aff'd., 252 U. S. 903 (1956); *United States v. American Tobacco Co.*, 221 U. S. 106 (1911). It is also permissible for a court to issue an injunction which

requires the court's continuing supervision. *Carpenter Baking Co. v. Bakery S. D. Local Union*, 237 Wis. 24, 38, 39, 40, 296 N. W. 118 (1941).

19.) A recurring defense argument and, in fact, an affirmative jurisdictional defense is that the action by the State of Wisconsin attempts to compel the defendant to continue to do business in the State in violation of the Federal Constitution. Defendants ask in what position does the state find itself in attacking the monopoly and then asking for it to come back to the state?

In the court's opinion the plaintiff presents a legally adequate answer to that defense. Plaintiff states that there are two solutions to the question. One is to dissolve the monopoly, void the uniform player contract and re-establish competition. The other is to let baseball continue to enjoy the internal monopolistic prerogatives which it deems necessary for the continuance of top level competition in Major League baseball but to require them by court decree to respond in a responsible and reasonable manner in matters pertaining to the transfer and allocation of franchises. The state asserts that it has elected to take the latter course which presents two primary factual issues: (a) whether the decision of the owners, the National League, made in October and November of 1964, was a responsible and reasonable decision or was arbitrary or even capricious and whether the refusal of the league to deal, to grant an expansion franchise was arbitrary, (b) whether or not the self-regulated monopoly has accorded all interested parties due process. *United States v. Terminal Railroad Ass'n*, 224 U. S. 383 (1912).

And all parties to this action having submitted to the court proposed Findings of Fact and Conclusions of Law, and requested the court to find in conformity therewith, and after hearing the allegations and proofs of the parties, considering the exhibits introduced and having heard the arguments of counsel, and being fully advised in the premises, I, the judge before whom the same was tried, do decide and find the same as follows:

FINDINGS OF FACT

1. The plaintiff, State of Wisconsin, is a sovereign state of the United States of America.

2. The defendant, the National League of Professional Baseball Clubs (hereinafter called "National League") is an unincorporated association having its office and principal place of business in Cincinnati, Ohio.

3. The defendant, Milwaukee Braves, Inc., whose corporate name was changed to Atlanta Braves, Inc. after the commencement of this action on October 19, 1965, is a corporation organized and existing under the laws of the State of Delaware. Its principal office and place of business at the time of the commencement of this action was Milwaukee, Wisconsin. Its principal office and place of business was transferred to and has been at least since January 1, 1966, in the City of Atlanta, Georgia. The said corporation is a franchised member of the National League.

4. The remaining defendants are the nine additional members of the National League. Each of them is a cor-

poration organized and existing under the laws of the state identified below and has its office and principal place of business in the city designated below.

Name	State of Incorporation	Office and Principal Place of Business
Houston Sports Association, Inc.	Texas	P. O. Box 288 Houston, Texas
Chicago National League Ball Club	Delaware	Wrigley Field Clark & Addison Chicago, Illinois
Cincinnati Reds, Inc.	Ohio	415 Central Trust Bank Tower Cincinnati, Ohio
Los Angeles Dodgers, Inc.	New York	1000 Elysian Park Los Angeles, Cal.
Metropolitan Baseball Corporation, Inc.	New York	680 Fifth Ave. New York, N. Y.
Philadelphia National League Club	Pennsylvania	Connie Mack Stadium 21st & Lehigh Philadelphia, Pa.
Pittsburgh Athletic Club, Inc.	Delaware	P. O. Box 7495 Pittsburgh, Pa.
St. Louis National Baseball Club, Inc.	Missouri	3625 Dodier St. St. Louis, Mo.
National Exhibition Company, Inc.	New Jersey	Candlestick Park San Franciseo, Cal.

Each of the defendants has been properly served with a summons and complaint in this action, and all of the defendants have made a general appearance herein.

5. The ten corporate defendants are engaged in the business of organizing, promoting and exhibiting professional baseball games played by teams of professional baseball players. Each of said corporate defendants operates a so-called Major League team playing a Major League championship schedule prepared by the defendant, National League. Under said schedule the team of each corporate defendant plays approximately one-half its scheduled championship games in the city shown above as its respective principal place of business and the remainder divided equally at the location of the remaining corporate defendants' principal places of business. During a season the team of each corporate defendant plays an equal number of championship games with the team of each other corporate defendant.

6. The teams of the corporate defendants are each comprised of professional baseball players, each of whom contracts his services to his employer under a form of contract known as the Uniform Player Contract.

7. The American League of Professional Baseball Clubs is an unincorporated association comprised of ten corporate members which also organize, promote and exhibit professional baseball games by operating baseball teams which play a championship season schedule of the type described above. The said National League and American League are known as the Major Leagues. Each of the corporate members of each member League of the National Association of Professional Baseball Leagues also organizes, promotes and exhibits professional baseball games in

other cities and under the rules of other leagues, these other leagues being known as the minor leagues. All minor leagues are members of the National Association of Professional Baseball Leagues, an unincorporated association. The three unincorporated associations are governed by rules and regulations which recite the interrelation of their activities and the operations of the respective member corporate operators of baseball teams.

8. Each championship professional baseball game is played on a home ball field of one of the league teams. Each ball field is enclosed from the public, and the public is charged an admission fee to see each game. The visiting baseball team receives a predetermined share of the admission proceeds.

9. Each teams holds a franchise from its respective league to operate a professional Major League baseball club in its franchised territory. The franchise is evidenced by a Certificate of Membership signed by the Major League president. There are ten franchises in each Major League. During the championship season, the corporate defendants do not schedule or play championship professional baseball games with any person to whom the National League has not issued a franchise.

10. Each of the corporate defendants, including Milwaukee Braves, Inc., has approximately forty professional Major League baseball players under contract. Each of the corporate defendants owns the exclusive right to assign and renew the contract of each such Major League baseball player. Each of the corporate defendants either owns minor

league professional baseball teams or has entered into working agreements with such teams, and is thereby able to obtain the services of a large number of minor league professional baseball players.

11. Each of the corporate defendants plays its scheduled games in accordance with the National League championship schedule. Between January 1, 1953 and December 31, 1965, defendant Milwaukee Braves, Inc. annually played approximately one-half the games scheduled for it on the National League Championship schedule in Milwaukee County Stadium. For each of the years ended December 31, 1960 through 1964, inclusive, the annual receipts of defendant Milwaukee Braves, Inc. and of its corporate predecessor, National League Baseball Club of Milwaukee, Inc., from sales of tickets for such games exceeded $1,000,000.

12. Each of the corporate defendants cooperates with radio and television stations and enters into contracts permitting radio and/or television broadcasting of certain of its championship games. Between January 1, 1960 and December 31, 1964, defendant Milwaukee Braves, Inc. and its corporate predecessor, National League Baseball Club of Milwaukee, Inc., entered into contracts permitting the radio and/or television broadcasting of championship games played in Milwaukee County Stadium. During that period, defendant Milwaukee Braves, Inc. and its corporate predecessor, National League Baseball Club of Milwaukee, Inc., sold the rights to broadcast such games and received therefor substantial sums of money.

13. The exhibition of Major League championship games attracts widespread public interest and is regularly publicized by newspapers and magazines and is broadcast by network television and radio. The exhibition of Major League baseball is a market separate and distinct from the exhibition of minor league or college baseball games, or other entertainment exhibitions.

14. Prior to December 31, 1965, defendant, Milwaukee Braves, Inc. and its corporation predecessor, National League Baseball Club of Milwaukee, Inc., made substantial purchases of food, beverages and other goods for resale to members of the public in attendance at Milwaukee County Stadium.

15. Professional baseball is organized by a series of interrelated agreements among the member teams of the National and American Leagues, between the two Major Leagues, among the minor leagues, and an association of minor leagues, and among the minor leagues. Through these agreements, substantially all relationships among the various leagues, teams, owners, agents and players are regulated.

16. The corporate defendants are the only members of the National League. No additional members may be admitted to the National League without the unanimous consent of the corporate defendants.

17. The defendants and the American League and its members are parties to the Major League Agreement.

18. Defendants and the American League and its members have agreed to and do control the right to employ

the services of substantially all present and future professional baseball players of Major League caliber, and have agreed to determine and do determine the time and place of exhibition and broadcast of all Major League games.

19. The defendants and the American League and its members have agreed to and do prohibit all Major League professional baseball players from contracting to perform and from performing as players during their playing careers otherwise than upon the terms and conditions established by the National League and the American League and its members.

20. The defendants and the American League and its members have agreed to and do designate and limit the places where Major League professional baseball games may be exhibited to the public.

21. The defendants and the American League and its members have agreed to and do prevent performances by all Major League professional baseball players and clubs, except upon terms and conditions determined by the defendants and the American League and its members.

22. The defendants and the American League and its members have agreed to prescribe and enforce and have prescribed and enforced rules and regulations governing substantially all relationships among the various baseball leagues, teams, owners, agents and players.

23. The defendants and the American League and its members have agreed to establish and have established the office of Commissioner of Baseball, and have agreed to per-

mit him, and have permitted him, to arbitrate disputes and to enforce decisions, in accordance with the terms of the Major League Agreement and the Major League Rules.

24. The Major League Agreement and the Major League Rules enable the defendants and the American League and its members to eliminate competition between them for the employment of professional baseball players and to prevent persons not parties to that agreement, the Professional Baseball Agreement or the National Association Agreement from engaging the services of professional baseball players.

25. Over a period of many years, the defendants and the American League and its members have achieved adherence to the Major League Agreement, the Professional Baseball Agreement, and the National Association Agreement of all persons engaged in professional baseball by the use, and threat of use, of practices such as refusing to deal with clubs and leagues not parties to said agreements and excluding from employment as a player any player who failed or refused to submit to or be bound by the terms of those agreements and rules promulgated pursuant thereto. Since the establishment of the American League, all attempts to organize additional Major Leagues have been prevented by the defendants and the American League and its members.

26. The defendants have agreed to a plan to terminate, and acting together carried out their plan and have terminated the playing and exhibition of Major League baseball games in Milwaukee. The Major League Agree-

ment, the Professional Baseball Agreement, the National Association Agreement, and Rules adopted pursuant to and in accordance with those Agreements, operate to prohibit the establishment of a Major League professional baseball team with Milwaukee as its home and Milwaukee County Stadium as its home grounds, unless such successor is granted a Certificate of Membership in the National League or the American League. Such agreements and rules prohibit Major League Baseball players from contracting to play Major League baseball in Milwaukee as members of the team of any person (including Milwaukee Brewers Baseball Club, Inc., and Milwaukee County) not a member of the National League or the American League. By entering into such agreements and adopting such rules the defendants, and the members of the American League, have agreed to and do refrain from scheduling or playing Major League championship baseball games with the team of any person (including Milwaukee Brewers Baseball Club, Inc. and Milwaukee County) who might, without having been admitted to membership in the National League or the American League, organize and prepare to operate a Major League baseball team with Milwaukee as its home and Milwaukee County Stadium as its home grounds.

27. In July of 1963 Officers of defendant, Milwaukee Braves, Inc., first became interested in moving the team to Atlanta. This interest continued during the 1964 championship season. The rumors of the defendant Braves' interest in Atlanta printed in the local and national press during 1963 and 1964, adversely effected attendance at Milwaukee home games during the 1963 and 1964 championship sea-

sons. Defendant Braves did not properly promote interest in attendance at Braves home games during 1965. The defendants and officers of the defendants have disparaged Milwaukee as a city where Major League baseball can be successfully and profitably exhibited by a home team.

28. The exhibition of Major League professional baseball games in the City of Milwaukee has been terminated by the defendants. Major League professional baseball will not again be exhibited in Milwaukee, Wisconsin, until the National League or the American League locates a franchise in Milwaukee.

29. The Milwaukee Brewers Baseball Club, Inc. and Milwaukee County have each made proper application to the National League and to the American League for membership therein. Each such League has failed or refused to grant each such application.

30. Milwaukee County is unable to secure as a tenant for Milwaukee County Stadium a Major League professional baseball team playing its home games on the championship schedule in Milwaukee County Stadium.

31. The termination of the exhibition of Major League baseball games in Milwaukee County Stadium prevents the sale at Major League professional games in Milwaukee County Stadium of substantial amounts of food, beverages, and merchandise.

32. The termination of the exhibition of Major League baseball games in the Milwaukee County Stadium restrains and prevents the sales of commodities and services by res-

taurants, hotels, motels, taxis and other transportation facilities to spectators who would attend Major League professional games at Milwaukee County Stadium.

33. The termination of the exhibition of Major League professional baseball games at Milwaukee County Stadium prevents the Milwaukee newspapers, radio stations and television stations from printing, broadcasting and telecasting Major League professional baseball games at Milwaukee County Stadium.

34. The termination of the exhibition of Major League baseball games at Milwaukee County Stadium eliminates the competition for spectators which heretofore existed between the Milwaukee County Stadium and Wrigley Field and Comiskey Park in Chicago, Illinois.

35. The termination of the exhibition of Major League baseball games at Milwaukee County Stadium eliminates the competition which heretofore existed between television and radio stations located in Milwaukee, Wisconsin, and Chicago, Illinois, for the Major League audience in Southern Wisconsin and Northern Illinois.

36. In the absence of a Major League baseball club playing its home championship schedule of games in Milwaukee County Stadium, the State of Wisconsin, County of Milwaukee, and City of Milwaukee will be deprived of substantial tax revenues previously levied upon the sales of food, beverages and souvenirs at the exhibition of Major League baseball games at Milwaukee County Stadium.

37. The termination of the exhibition of Major League baseball games in Milwaukee County Stadium will deprive the public, within commuting range of said Stadium, of the economic and recreational benefits of the exhibition of Major League professional championship baseball games at Milwaukee County Stadium.

38. The defendants and the American League and its member clubs, the National Association of Professional Baseball Leagues, the member leagues and member clubs of the aforementioned National Association, have an economic monopoly over the exhibition of professional baseball. The Constitution of the National League grants unlimited power and discretion to determine the location of a franchise; provides it no objective standards for determining whether or not to grant a request for a transfer of a franchise, and contains no rules of procedure which would accord the city, county or state from which any such proposed transfer would be made, an opportunity to be heard.

39. During the period 1953-1962 the National League Baseball Club of Milwaukee, Inc., the corporate predecessor of defendant Milwaukee Braves, Inc., earned more than $7,500,000 before taxes from baseball operations. In 1962 the Braves' franchises, player contracts and other assets carried on the books at approximately $322,000 were transferred from National League Baseball Club of Milwaukee, Inc., ultimately to defendant Milwaukee Braves, Inc., for $6,218,480. As a result of said transfer, National League Baseball Club of Milwaukee, Inc. realized gain of approximately $5,583,000 give or take $1,000,000. During the above

period salaries of $445,000 were paid to the Perini family and dividends of $300,000 were paid to the Perini Corporation.

40. Over the five year period *1960-1964* on a cash basis the Braves and their corporate predecessors realized total income of $836,900. The Braves reported to their shareholders net losses of $43,378 in 1963 and $45,270 in 1964. Net income from operations was reported as $82,393 in 1963 and $104,730 in 1964. These net income figures were reduced by interest expense on funds borrowed to purchase the Braves of $125,771 and $150,000 respectively in arriving at the net loss figures. In 1964 $48,800 of expense in connection with relocation of the franchise were charged against income.

41. Had scouting expenses been capitalized as were player acquisition and development costs as sound accounting methods would require, the Braves would have shown a net income of approximately $170,000 in 1963 and $151,000 in 1964.

42. The Braves net receipts from the sale of radio and television broadcasting rights compare favorably with the net receipts of the defendant clubs that submitted figures to this court.

43. During the period from 1953 through 1965, the Milwaukee Braves, Inc. and its corporate predecessors had a total home paid attendance of 19,551,163. This was greater than any club in either Major League with the exception of the defendant, Los Angeles (Brooklyn) Dodgers. The average annual attendance for this period in Milwaukee

was over 1.5 million. This average was the second highest of any club in either league. The attendance level was 31% more than the average of teams in the defendant National League and 52% higher than the average for teams in the American League. Milwaukee home attendance increased from 773,818 in 1962 to 910,911 in 1964, despite the rumored relocation of the franchise to Atlanta, Georgia. The level of Attendance in 1965 was not representative, due to the fact that the franchise was to be relocated in Atlanta, Georgia for the 1966 season.

44. The Braves were financially successful during the time it operated a National league baseball club in Milwaukee. Milwaukee has the demographic economic and population characteristics necessary to support a Major League baseball club. Milwaukee has the ability to reasonably support a Major League team.

45. That expansion of the National League is feasible.

And the following:

CONCLUSIONS OF LAW

1. The defendant corporations have violated Section 133.01 of the Wisconsin Statutes (1963) in the following respects:

a. Having agreed among themselves to control and allocate professional baseball players, to assign to the respective corporate defendants exclusive territorial rights and privileges respecting the exhibition of pro-

fessional Major League baseball games, and to limit the number of members in the National League of Professional Baseball Clubs of which the defendants are all the constituent members, they have now agreed to transfer the site of Major League baseball exhibitions from Milwaukee, Wisconsin, to Atlanta, Georgia, with the result that trade and commerce within the State of Wisconsin have been substantially restrained.

b. They have combined and conspired among themselves to monopolize the business of Major League professional baseball within the State of Wisconsin.

2. The National League of Professional Baseball Clubs is and has been the means and instrumentality by which the corporate defendants have engaged in the practices referred to in Paragraph 1 hereof.

3. By means of the practices outlined in Paragraph 1 hereof the corporate defendants and their counterpart members of the American League of Professional Baseball Clubs have acquired monopolistic control of all available ball players of Major League caliber, with the result that the granting of permission from one of the said leagues in the form of a franchise to operate a Major League baseball team is necessary for any person to engage in the business of professional Major League baseball.

4. The corporate defendants' monopolistic control of Major League professional baseball requires the defendants to exercise reasonable control and to follow reasonable procedures in the issuance of memberships in the National League of Professional Baseball Clubs and in the defini-

tion of sites for baseball exhibitions and as respects the transfer of memberships.

5. The transfer by the corporate defendants of the franchise in the National League of Professional Baseball Clubs from Milwaukee, Wisconsin, and the refusal to issue a replacement franchise allowing the exhibition of Major League baseball in Milwaukee, Wisconsin, was an unreasonable exercise of the monopolistic control of the business of Major League professional baseball and was in violation of Section 133.01, Wisconsin Statutes (1963).

6. The refusal of the National League and the failure of the American League to issue a franchise to Milwaukee County or the Milwaukee Brewers Baseball Club, Inc., was a concerted refusal to deal in restraint of trade and commerce within the State of Wisconsin in violation of Section 133.01, Wisconsin Statutes (1963).

7. This Court has jurisdiction over all of the parties and of the subject matter hereof.

8. The State of Wisconsin is the real party in interest in this action. The Attorney General and the Corporation Counsel of Milwaukee County were authorized to bring this action under the statutes of the State of Wisconsin. Teams, Inc., the Greater Milwaukee Committee and other private citizens in Wisconsin were entitled to inform the Attorney General of alleged violations of Section 133.01, Wisconsin Statutes (1963).

9. That by reason of said violation of Section 133.01

said defendants and each of them has incurred a forfeiture provided by Statute.

10. That the plaintiff is entitled to judgment against said defendants and each of them in the sum of $5,000 with costs and disbursements.

11. That the plaintiff is entitled to the injunctive relief prayed for in its complaint.

12. That the defendant Milwaukee Braves, Inc., now known as Atlanta Braves, Inc., and all other defendants herein, shall be and they are hereby restrained and enjoined from playing the home championship schedule of the defendant Milwaukee Braves, Inc., now known as Atlanta Braves, Inc., in any city or place other than in the County of Milwaukee, State of Wisconsin, at County Stadium; provided that:

1.) This order shall be stayed, under the continuing jurisdiction of the Court to the 18th day of May, 1966, and may thereafter be extended in the event that the defendants shall, prior to 12:00 o'clock noon, C. S. T., on the 16th day of May, 1966, submit to this Court a written plan or plans for expansion of the defendant National League of Professional Baseball Clubs so as to permit Major League baseball to be played at County Stadium with the City of Milwaukee as its "home", effective with the playing season for the year 1967;

2.) Such expansion shall contemplate the granting of a National League franchise to the County of Milwaukee or to such qualified third parties as shall be interested in

acquiring a National League franchise, and will advise the Court of such fact.

3.) The Court reserves jurisdiction in connection with any such plan or plans until the same may be consummated between the ultimate parties.

4.) So that there will be no misunderstanding, the stay herein granted will expire at 12:00 o'clock noon, C. S. T., on May 16th, 1966, if no such plan is submitted within said time. Likewise, the stay, or any extension thereof granted on the strength of any plan submitted, will be terminated by the Court in the event the Court concludes that the plan is unsatisfactory.

5.) The defendant, Milwaukee Braves, Inc., now known as Atlanta Braves, Inc., will perform its home games in the County of Milwaukee under the supervision of the court and such board or commission hereinafter appointed by the court.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

ELMER W. ROLLER
Circuit Judge

Dated: April 13th, 1966.

I cannot conclude this matter without expressing my admiration for the fine briefs submitted and arguments made by the able attorneys who appeared in this case, nor expressing my thanks to the many reporters who worked all day and then into the night getting out daily copy, to my hard-working clerk who never left until every exhibit

was safely filed away and to my two bailiffs who kept such good order in the court room.

But most of all to the judge who left his own court and did so much research day and night to lighten my burden. To him I am eternally grateful—my friend and colleague, Circuit Judge Marvin C. Holz.

ELMER W. ROLLER

Dated: April 13th, 1966.

APPENDIX C

MEMORANDUM DECISION ON DEMURRER OF TRIAL JUDGE IN CIRCUIT COURT MILWAUKEE COUNTY

(Formal Parts Omitted)

Defendants' demurrers to plaintiff's complaint. This is an antitrust action.

The Complaint

The defendant, National League of Professional Baseball Clubs (also referred to as National League) is an unincorporated association having as its purpose the promotion of the interests of the other ten defendants, all incorporated, (also referred to as the "clubs") who are franchised members thereof and who are sued individually and as representatives of the National League and of the class consisting of the members of the National League.

Professional baseball clubs are organized into leagues composed of member clubs, each of which has a geographical location in a different city (and with only several exceptions in a different state) which is called its "home." Each club maintains a team of skilled players under contract to play for the club. Each club plays games for exhibition with each of the other member clubs in its league during the baseball season, each club playing approximately one-half of its games in its home ball park.

The defendant, National League, and the American League are designated the major leagues. These leagues are composed of ten members each. All other leagues in professional baseball are designated as minor leagues and teams maintained by the clubs which are members of the minor leagues are designated as minor league teams. Each minor league is a member of the National Association of Professional Baseball Leagues. All of the baseball clubs in organized professional baseball are either members of the defendant, National League, the American League or a league which is a member of the National Association of Professional Baseball Leagues.

Jurisdiction and venue are based upon the defendants' alleged continuing contract, combination or conspiracy in unreasonable restraint or trade both within and without the State of Wisconsin in violation of section 133.01, Stats., and of the common law and that substantial parts of such violations have occurred in and effect commerce with Milwaukee County. (par. 1)

With respect to the parties the complaint alleges that the suit is brought by the State of Wisconsin in its sovereign and governmental capacity with the Attorney General and his assistants and the Corporation Counsel acting pursuant to sections 133.02, 14.525 and related sections of the state's statutes (par. 2); that all defendant clubs are incorporated and have their principal place of business (except defendant Milwaukee Braves, Inc.) in jurisdictions other than Wisconsin (par. 3)

It is alleged that the trade and commerce involved in the suit is the organizing and promoting of professional baseball games; the complaint sets forth the organization of the leagues and the organization of play, alleges that the Braves hold a franchise from the National League to operate a professional major league baseball club in the City of Milwaukee, Milwaukee County; that the defendant Braves own the exclusive rights to the services of approximately forty major league professional baseball players, together with the exclusive right to assign and renew each such contract and that they also own the conditional right to the services of a large number of professional players not in the major leagues; that the defendant Braves play approximately 162 baseball games each year, plus certain exhibition games being played in Milwaukee County Stadium, the home stadium of said defendant and over the period of 1960-1964, the annual receipts for sales of tickets for such home games exceeded one million dollars; that in consideration of large sums of money paid to them, the various clubs and leagues, including defendants, enter into contracts permitting radio broadcasting and telecasting of baseball games; that the clubs cooperate with national networks in the production and broadcasting of such games for national broadcasting, that many of the games played by the defendant Braves are broadcast and telecast in the County of Milwaukee and in the state and throughout the United States, that the sale of such rights to such production and broadcast and telecast is a substantial business of the clubs and the leagues, that over the period of 1960-1964 the defendant Braves sold such rights for sums in excess of $3.2

millions; that major league baseball attracts widespread public interest which is regularly publicized in the sporting pages of newspapers and magazines and attracts network television and radio sponsorship, that the caliber of both individual and team play in major league professional baseball is far superior to that of minor league or college baseball and only a small number of minor league players or college players are able to obtain positions on major league professional baseball teams; that the defendant Braves are engaged in the business of buying and selling food, beverages and other goods for profit at Milwaukee County Stadium to the public in attendance at baseball and football exhibitions and other public functions, that over the period 1960-1964 the defendant Braves' annual receipts for such sales exceeded $300,000; that the defendant Braves, the radio and television stations which broadcast their games, the newspapers which report them and the suppliers of various kinds and advertisers who cater to the wants and needs of their audiences are all in competition with other business of a similar nature. (par. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14)

In connection with the offense charged, under IV of the complaint, it is alleged that professional baseball is organized by a series of interrelated agreements among the member teams of the National and American Leagues, between the two major leagues, among the major leagues and an association of minor leagues, and among the minor leagues, that through these agreements substantially all relationships among the various leagues, teams, owners, agents and players are regulated (par. 15); that the de-

fendant Braves and the other clubs have subscribed and agreed to be bound by the constitution and rules of the league, they being the only members of the National League and that no other person may be admitted to membership in the league except upon the unanimous consent of the present clubs (par. 16); that the Braves, the other clubs, and the league and persons acting in concert with them, are parties to the "Major League Agreement" (par. 17); that the constitution of the league and the Major League Agreement create in the Braves, the other clubs and the league, and persons acting in concert with them (a) a monopoly in the right to employ the services of all present and future professional baseball players of major league quality, (b) the absolute power to determine the time and place of exhibition and broadcast of all major league games (par. 18); that in addition, the constitution of the league and the agreement give to the Braves, the other clubs and the league and persons acting in concert with them the absolute monopoly power; (a) to prohibit any major league professional baseball player from performing as a player except upon terms determined by them, (b) to limit the territory where major league may be performed and the places from which they may be radio broadcast or telecast, (c) to bar from any city, county or state, except upon such terms and at such times and places as they may dictate, any performance by any major league professional player or club, (d) to prescribe rules and regulations governing all relationships among the various leagues, teams, owners, agents and players, making the Commissioner of Baseball the final arbiter of disputes involving baseball and

to enforce his decisions by fines, suspensions, and other penalties, and to bar judicial review of any such decision (par. 19); that these agreements restrain competition by skilled professional players for employment, prevent persons seeking to organize or operate major league professional baseball clubs from engaging the services of such players and establish in the Braves, the other clubs, and the league, a monopoly of the right to use and services of such players and of the business of operating major league professional clubs (par. 20); that over a period of many years the clubs and the leagues have achieved adherence of all persons engaged in professional baseball to said agreement by the use and threat of use of practices such as refusals to deal with other clubs and leagues not parties to said agreements, by excluding from employment as a player any player who refused to be bound by the terms of said agreements, and they have thereby protected their monopoly and their agreement to monopolize the right to the services of such players. (par. 21)

The defendants are charged with unlawful acts in V of the complaint (par. 22, 23) alleging as follows:

"22. Pursuant to a combination and conspiracy and agreement to monopolize, and to protect and extend their monopoly and to restrain and eliminate competition with respect to radio and television rights and other commerce within the State of Wisconsin and among the several states, the Braves, the other clubs, the league and persons acting in concert with them have agreed to an illegal plan:

"(a) to terminate the playing and exhibition of major league baseball games by the Braves in Milwaukee;

"(b) to play and exhibit the Braves' home games in Atlanta, Georgia, for at least twenty-five years;

"(c) to prohibit any successor to the Braves from organizing and operating a major league baseball team in Milwaukee and from playing major league baseball games using Milwaukee as 'home' after the intended departure of the Braves from Milwaukee;

"(d) to prohibit Milwaukee Brewers Baseball Club, Inc., Milwaukee County, or any other person or persons willing and able to do so, from contracting for the services of any major league baseball players to play major league baseball in Milwaukee; and

"(e) to restrain and prevent Milwaukee Brewers Baseball Club, Inc., Milwaukee County, or any other person who may wish to organize and operate a major league baseball team with Milwaukee as its 'home' from scheduling or playing a major league baseball game with any club in the league;

"(f) to fail properly to promote interest in attendance at Braves' home games during 1965, to disparage Milwaukee as a city where major league baseball can be successfully and profitably exhibited by a home team, and thereby to justify their claim of bona fide business reasons for quitting Milwaukee.

"23. In pursuance of the aforesaid combination, conspiracy and agreement to monopolize, and in order to carry

out the aforesaid illegal plan, the Braves have entered into, and the other clubs and league, and persons acting in concert with them, have approved, an illegal and void contract with the Fulton County (Georgia) Stadium Authority obligating the Braves to play all of their league home games in the Fulton County Stadium, for a period of twenty-five years."

The effects of the contract, combination, conspiracy and use of monopoly power are alleged in VI of the complaint. There it is alleged that by the foregoing acts the defendants, and persons acting in concert with them, intend to and will (a) terminate, restrain and prevent the exhibition of major league baseball games in the city, county and state, (b) restrain and prevent any individual major league player from performing in any major league game in the city, county and state, (c) fail and refuse to grant the application of the County of Milwaukee or of the Milwaukee Brewers Baseball Club, Inc., to become a member of the league and prohibit major league players from negotiating with or accepting employment to play baseball for such county or corporation, on any team whatsoever, (d) to restrain and prevent any other person or persons willing and able to organize and operate a major league team in Milwaukee from so negotiating or contracting with major league players for their services or with other major league teams for games, (e) to terminate, restrain and prevent radio broadcasting or telecasting of home professional major league games from the city, county or state, (f) restrain and prevent the county of Milwaukee from operating the stadium for public exhibitions of major league professional games

and the transmission and narration of such games from the stadium by radio and television, (g) restrain and prevent the sale at major league professional baseball games in the stadium of food, beverages and merchandise from within and without Wisconsin, (h) restrain the sales of commodities and services by restaurants, hotels, motels, taxis and other transportation facilities to spectators attending major league games at the stadium, (i) restrain and prevent the Milwaukee newspapers, radio and television stations from printing, broadcasting and telecasting substantial material generated by the public exhibition of major league games in the city, county and state, (j) eliminate the competition between the Milwaukee County Stadium and Wrigley Field and Cominskey Park, in Chicago, Illinois, for spectators at major league games, (k) eliminate competition between television stations in Chicago, Illinois, for the market consisting of persons in southern Wisconsin and northern Illinois who view telecasts of major league games, (l) play and permit the playing of all of the Braves' home games for twenty-five years in the Fulton County Stadium and thereby prevent Milwaukee and other cities desiring major league home teams from competing with Atlanta for the Braves. (par. 24)

In Part VII of the complaint is is alleged that the public will be irreparably injured in that Milwaukee County (a) will be prohibited from securing for the stadium a comparable tenant, (b) will be the owner of a substantial facility for exhibition of major league games and will be unable to obtain such games, (c) the plaintiff and its various subdivisions will be deprived of substantial tax revenues

presently levied upon sales of foods, beverages and souvenirs and collected upon behalf of the plaintiff for the benefit of all of the citizens of the state; that the public within commuting range of the stadium will be denied the economic and recreational benefits of free competition in the business of major league baseball, in violation of section 133.01, Stats., and the common law. (par. 25, 26)

The defendants, Milwaukee Braves, Inc., individually, and the National Association of Professional Baseball Clubs and the other defendant Clubs, collectively, filed separate and identical demurrers to the complaint, on the grounds:

(1) That the court lacks jurisdiction over the subject matter;

(2) That the plaintiff has not legal capacity to sue;

(3) That there is a defect of parties plaintiff;

(4) That there is a defect of parties defendant;

(5) That several causes of action have been improperly united;

(6) That the complaint does not state facts sufficient to constitute a cause of action.

(7) As a 7th ground, not stated under any objection to defects specified in section 263.06, Stats., it is alleged that the action attempts to deprive defendants of rights guaranteed them by the State Constitution.

The court has concluded that the complaint is sufficient in law and that the demurrers must be overruled.

1.) A demurrer raises only issues of law on the facts alleged in the pleading demurred to.

The defects claimed to render a complaint insufficient in law, by statute and at common law, are such as appear on the face of the pleading. In its consideration of the issues so raised by the demurrer, the court is persuaded by certain basic rules of construction, one of which is that the court should consider only the allegations of the pleading. *Horlick v. Swoboda,* 221 Wis. 373, 380, 267 N. W. 38; *Cochrane v. C. Hennecke Co.,* 186 Wis. 149, 202 N. W. 199; *Utschig v. McClone,* 16 Wis. (2d) 506, 114 N. W. (2d) 854; *State v. Texaco,* 14 Wis. (2d) 625, 111 N. W. (2d) 918; *State v. Chippewa Cable Co.,* 21 Wis. (2d) 598, 124 N. W. (2d) 616; *Gregory III v. Madison Mobile Homes Park,* 24 Wis. (2d) 275, 128 N. W. (2d) 462. And this rule is applicable not only to the general demurrer, but to special demurrers as well. *G. M. C. Hotels, Inc. v. Hanson,* 234 Wis. 164, 209 N. W. 615. Hence the court has not considered factual matters *dehors* the record presented by either party in brief or on oral argument.

Then also, from the standpoint of pleading, the effect of the demurrer is to admit the truth of all material facts well pleaded in the complaint and in considering whether the complaint is sufficient in law, it should be liberally and favorably construed to the pleader, and the pleader is entitled to all reasonable inferences which can be drawn from the facts pleaded. *Mitchell v. City of Horicon,* 264 Wis. 350, 59 N. W. (2d) 469; *Northwestern Mut. Life Ins. Co. v. State,* 173 Wis. 119, 180 N. W. 138; *Olson v. Ortell,* 264 Wis. 468, 59 N. W. (2d) 473; *Nelson v. LaCrosse Trailer Corp.,*

254 Wis. 441, 37 N. W. (2d) 63; *D'Angelo v. Cornell Paper Board Products Co.*, 19 Wis. (2d) 390, 120 N. W. (2d) 70.

The court is also persuaded to the conclusion that on demurrer the prayer for relief should not be considered as a substantive part of the complaint. *D'Angelo v. Cornell Paper Board Products Co., supra.* The defendants indicate an opinion that such rule is applicable only to the general demurrer, not to a special demurrer. The statute, however, limits all demurrers to "defects appearing upon the face of the complaint." This likewise appears to be the general rule. See 41 Am. Jur. Pleading, sec. 213 *et seq.*

In the court's opinion the particular statements of the defect (section 263.09, Stats.) stated in subdivisions (b) through (k) under the first ground of demurrer, relating to jurisdiction, are affirmative defenses and require proof.

Courts will judicially notice historical facts which are matters of general knowledge, especially such as peculiarly affect the state; and common knowledge will be applied to economic conditions of national effect and significance. But the court cannot here judicially notice any facts by which the demurrer can be sustained. The subject matter of this case is far too vital to be summarily disposed of by demurrer upon inadequate information contained within the four corners of the complaint. *Chicago & N. W. R. Co. v. La Follette*, 27 Wis. (2d) 505, 530, 135 N. W. (2d) 269.

The foregoing principles have been applied by our court in cases involving the validity of state regulatory

laws involving economic defenses and conflict in state and federal law.

State v. Chippewa Cable Co., supra was an action brought by the state to compel the defendant to cease a continuing violation of section 114.135, Stats., regulating the height, location and use of any building or structure, enacted for the safe operation of aircraft in the state. One of the defenses was that the statute deprived the defendant of its property without due process of law and denied equal protection of the law in violation of both federal and state constitutional provisions. On demurrer to the answer the court noted that the type of issue presented by an allegation where the statute violates the constitution, "does not fit exactly into the usual classification of issues as fact or law"; that primarily it is an issue of law but because of principles controlling judicial review of legislative acts, the issue often is whether there may be reasonably conceived in the mind of the court facts which the legislature could have deemed to exist and which would form a reasonable basis for its validity. There the court said:

> "The process of judicial notice may be adequate to resolve the question under some circumstances, but particularly where economic regulation is involved, it may be necessary for a court to make a judicial investigation of facts outside the ordinary scope of judicial notice."

Ritholz v. Johnson, 244 Wis. 494, 12 N. W. (2d) 738, was brought to enforce section 153.10, Stats., which prohibited a certain type of advertisnig of optometric services. The

defendants demurred generally to the complaint challenging the constitutionality of the statute. The court sustained the order of the trial court overruling the demurrer on the ground that the court had no knowledge of the facts relating to the business being regulated, nor any satisfactory method of informing itself through encyclopedias and the like. It was held that the defendant should answer alleging facts which might warrant enactment of the statute and that the trial court should make a judicial investigation of any disputed facts. The court there said: "As ordinarily considered, taking judicial notice does not include these methods of obtaining knowledge of matters of which the court may take judicial notice but of which it has no knowledge." See also *White House Milk Co. v. Reynolds*, 12 Wis. (2d) 143, 106 N. W. (2d) 441; *Associated Hospital Service v. Milwaukee* (1961), 13 Wis. (2d) 447, 109 N. W. (2d) 271. Quite in point is *State v. Texaco*, 14 Wis. (2d) 625, 630, 631, 632, 111 N. W. (2d) 918, an action to enforce an administrative rule relating to unfair competition. On general demurrer to the complaint it was contended that the rule could not be applied to the defendant because it was in conflict with the Robinson-Patman Act. In sustaining an order overruling the demurrer the court said:

> "The conflict between the federal and state statute, if any, cannot be considered in the abstract. The defense must plead specific facts and parties when it alleges a defense based on a conflict of federal and state policy. Until this court knows what the facts are it cannot determine whether a conflict, if any, exists. The question of conflict is moot until it is presented in a

factually concrete manner. Because of the alleged conflict with the Robinson-Patman Act, 15 USCA, sec. 13 (p. 104, pocket part), it is of the utmost importance that the pertinent facts be brougtt as fully into the record as possible before a decision is reached.

"The federal case in Virginia is pending and if at all applicable must be pleaded as a matter of defense. The factual basis of the defense is not before us however, because in the instant case no answer has been filed or evidence submitted. Whether these cases are in fact prosecution for the same violation cannot be decided in a factual vacuum. This state is not precluded from the exercise of its police power on the mere possibility that a conflict of jurisdiction exists with the federal government; such conflict must be factually verified.

* * *

"We hold that the complaint states facts sufficient to state a cause of action under the provisions of secs. 100.24 (3), (4) and 280.02, Stats. An answer is required so that evidentiary facts may be produced at the trial level. This court and the trial court will then have relevant evidentiary facts now denied to it. *White House Milk Co. v. Reynolds* (1960), 12 Wis. (2d) 143, 106 N. W. (2d) 441."

Chicago & N. W. R. Co. v. La Follette, supra, was brought for judgment declaring certain provisions of the Wisconsin Full-Crew Law unconstitutional. The defendants demurred generally and challenged the jurisdiction of the court on the ground that Congress had pre-empted the subject of full-crew regulation. The complaint alleges three

causes of action: (1) Substantive due process; (2) unconstitutional burden upon interstate commerce; (3) equal protection of the laws. The trial court overruled the demurrers resting its decision on the second cause of action. It held that a judicial investigation should be undertaken and ordered the appellants to advise the respondents and the court, by way of answer, what they considered the reasonable basis or justification for the challenged statutes. In affirming the court quoted from *Gregory III v. Madison Mobile Homes Park* (1964), 24 Wis. (2d) 275, 278, 128 N. W. (2d) 462, as follows:

> " 'The subject matter of the instant action is far too vital to be summarily disposed of by demurrer upon inadequate information contained in the record on demurrer.' "

The conclusions are also consistent with the fact that on demurrer the court considers only such facts as are stated in the challenged pleading and matters relied on by the defendant, where not appearing on the face of the complaint, must be raised by answer.

A situation in point both as to substance and procedure is presented in *Commonwealth of Massachusetts v. McHugh*, 71 F. Supp. 516, 520 (D. C. D., Mass.) (1947), which was an action by the sovereign against officers and members of the Atlantic Fishermen's Union to enjoin an alleged violation of the state antitrust law. The complaint alleged that the Atlantic Fisherman's Union assumes jurisdiction over substantially all of the commercial fishing for fresh fish originating out of certain Massachusetts ports

and through its membership, exercises complete control over the activities of the fishemen in those areas and of the entire supply of fresh fish coming into those ports which constitute substantially the entire supply for the state; that the defendants through collaborating, cooperating and conspiring entered into a plan or scheme, the purpose of which was to control completely not only the catching of all fresh fish in the Atlantic Ocean adjacent to the commonwealth and those certain designated ports, but also to control the marketing, sale and price of all of said fish in such a manner as to create a monopoly, to illegally suppress competition and unreasonably restrain trade preventing the free pursuit of lawful business, trade or occupation, purchase and sale of fresh fish in violation of the common law and of the general law of Massachusetts. The defendants filed a petition for removal to the federal court on the grounds, among others, that interstate and foreign commerce and admiralty jurisdiction were involved and that the action was therefore within the exclusive jurisdiction of the federal court. The federal court remanded, stating in substance that since it did not appear in the plaintiff's bill of complaint that the suit arose under the Constitution and laws of the United States such fact cannot be supplied by any statement in the petition for removal. The court said: "(4) In the instant case, the bill of complaint sets out a cause of action arising under the state anti-trust act. Thus, on its face it sets out a suit arising under state law, not an action arising under the Constitution or laws of the United States. *Gully v. First National Bank*, 299 U. S. 109, 116, 57 S. Ct. 96, 81 L. Ed. 70; *State of Minnesota v. Northern Securities Company*, 194

U. S. 48, 65, 24 S. Ct. 598, 48 L. Ed. 870. This is so, even though the purposes of the Massachusetts anti-trust act are similar within its scope to the Sherman Act. There is no allegation that it is being brought under the Sherman Act or under the Constitution of the United States."

On remand in *Commonwealth v. McHugh*, 93 N. E. (2d) 751, the defendants filed a demurrer and two pleas, one in abatement, the other in bar, although as the court noted the matter set up in each of them was matter in bar. The court ordered the demurrer which raised issues of substantive law and the pleas to be heard with the merits.

2.) At the outset defendants maintain that the challenged actions of organized baseball are not within the scope of the Wisconsin Antitrust Law.

(a) In this connection they first say that organized baseball is exempt from the application of the Wisconsin laws. They support this contention by citing *Toolson v. New York Yankees, Inc.*, 346 U. S. 356, 74 S. Ct. 78, 98 L. ed. 64 (1953), *Federal Baseball Club of Baltimore v. National League*, 259 U. S. 200, 42 S. Ct. 465, 66 L. ed. 898 (1922) and *Radovich v. National Football League*, 352 U. S. 445, 77 S. Ct. 390, 1 L. ed. (2d) 456 (1957). In reliance on the latter case they maintain further that the challenged activities of the defendants are interstate in character and conclude that the state's action is void (1) as an exercise of the exclusive jurisdiction of the federal government to regulate interstate commerce and (2) in that it conflicts with federal policy with respect to the regulation of baseball. In both respects

they say (quoting plaintiff's counsel on the argument of a previous motion) that in dealing with the State's antitrust law the courts should be governed by federal precedents.

The *Federal Baseball case* held that baseball involves purely state affairs, with only incidental effects on interstate commerce, and was not interstate commerce within the meaning of the federal antistrust laws.

Federal Baseball was followed by a majority of the court in the *Toolson case*. The majority pointed out that Congress had the ruling of *Federal Baseball* under consideration but had not seen fit to bring the business under the federal antitrust laws. The court said: "Without re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs* (US) *supra*, so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."

But plaintiff notes that *Federal Baseball* was premised on the conclusion that organized baseball is not engaged in interstate trade or commerce and that Toolson did no more than to apply the principle of *stare decisis*. Mr. Justive Burton (Reed J. concurring) dissenting, did say that the effect of the decision "announces that organized baseball, in 1953, still is not engaged in interstate trade or commerce" and pointed out also that in *Federal Baseball* "the court did not state that even if the activities of organized

baseball amounted to interstate trade or commerce those activities were exempt from the Sherman Act."

In *United States v. Schubert*, 348 U. S. 222, 75 S. Ct. 277, 99 L. ed. 279 (1955), the court held that legitimate theatre business on a multi-state basis constitutes interstate trade or commerce within the meaning of the Sherman Act. There the court summarized pertinent cases decided since *Federal Baseball*, including holdings that services of real estate brokers, news media, doctors and insurance underwriters were engaged in interstate commerce and within the federal antistrust laws. In connection with defendants' reliance upon *Federal Baseball* and the *Toolson* cases the court refused to "convert this narrow application of the rule into a sweeping grant of immunity to every business based on the live presentation of local exhibitions, regardless of how extensive its interstate phases may be."

In *United States v. International Boxing Club*, 348 U. S. 236, 75 S. Ct. 259, 99 L. ed. 29 (1959), the court again reiterated the statement that the controlling consideration in *Federal Baseball* was "a very practical one—the degree of interstate activity involved in the particular business under review." And in *Radovich v. National Baseball League*, 352 U. S. 445, 77 S. Ct. 390, 1 L. ed. 456 (1957), the court did, as noted by the plaintiff, indicate the *stare decisis* effect of the baseball cases. The court did say: "In *Toolson* we continued to hold the umbrella over baseball that was placed there some 31 years earlier by *Federal Baseball*. The court did this because it was concluded that more harm would be done in overruling *Federal Baseball*

than in upholding the ruling which at its best was of dubious validity." The court said that it did not extend the interpretation of the Act (Sherman) made in *Federal Baseball* and *Toolson* to boxing or the theatre because it believed that the volume of interstate business in each—"the rationale of *Federal Baseball*"—was such that both activities were within the act.

In connection with defendants' argument that Congress, by its silence, has established as a national policy that the baseball monopoly is to be free of all antitrust regulation and that the Wisconsin law is in conflict with that policy and therefore pre-empted and unenforceable, the plaintiff makes a three-fold reply. The plaintiff replies that Congress has not clearly manifested a purpose to displace local laws. *California v. Zook*, 336 U. S. 725, 69 S. Ct. 841, 93 L. ed. 1005. In that connection they cite Public Law 87-331 enacted in 1961 which specifically exempted from the antitrust laws certain television pooling agreements of organized sports, including baseball.

Section 1291, 15 U. S. C. 1964 provides as follows:

> "The antitrust laws, as defined in section 12 of this title or in the Federal Trade Commission Act, as amended, shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs, participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football,

baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs. Pub. L. 87-311, Sec. 1, Sept. 30, 1961, 75 Stat. 732."

And in Section 1294, 15 U. S. C. Congress provided:

"Nothing contained in this chapter shall be deemed to change, determine, or otherwise affect the applicability or non-applicability of the antitrust laws to any act, contract, agreement, rule, course of conduct, or other activity by, between, or among persons engaging in, conducting, or participating in the organized professional team sports of football, baseball, basketball, or hockey, except the agreement to which section 1291 of this title shall apply. Pub. L. 87-331, Sec. 4, Sept. 30, 1961, 75 Stat. 732."

In the court's opinion there is another consideration to be given to the defendants' claim of baseball's immunity from state antitrust law by reason of Congressional silence, resulting from the basic differences between the instant case and the baseball cases.

Federal Baseball was a suit for treble damages brought against the National League of Professional Baseball Clubs and the American League of Professional Baseball Clubs, unincorporated associations, composed respectively of groups of eight incorporated baseball clubs joined as defendants, the president of the two Leagues and a third person, constituting the National Commission, and three other persons having powers in the Federal League. The plaintiff was a baseball club and a member of the Federal League of Professional Baseball Players that attempted to compete with the combined defendants. The complaint

alleged that the defendants destroyed the Federal League "by buying up some of the constituent clubs and in one way or another inducing all those clubs except the plaintiff to leave their league * * *." *Toolson* was brought by a professional baseball player, who alleged that as a result of a monopoly to which the defendants were parties, he had been deprived of his livelihood. Pursuant to the provisions of his contract and the regulations which govern the structure of organized baseball, the defendants refused to allow plaintiff to play professional baseball. The plaintiff in *Toolson* attacked the internal restraints of the trade by which baseball monopoly was organized and maintained.

Does the claimed immunity under *Federal Baseball* and *Toolson* sweepingly extend, speaking objectively now, to the activities in restraint of trade by the use of baseball's monopoly power, herein alleged, to a community which is not in or a part of organized baseball?

There is a difference—a material difference—between the baseball cases and the instant case, certainly in the violations charged under the Sherman Act and those alleged here, a difference which in the court's opinion may not be reasonably ignored.

In *Radovich* the court specifically limited the rule of the baseball cases "to the facts there involved, i. e., the business of organized professional baseball."

This distinction is noted in *United States v. National Football League,* 116 F. Supp. 319, 328 (D. C. E. D. Pa. 1953), which was an action to enjoin the enforcement of by-laws

of the National Football League restricting televising and broadcasting of professional football games. The court held that the restrictive by-laws imposed substantial restraints on the television and radio industries. The case was heard before *Radovich* and the court considered that professional football might have some antitrust immunity under the *Toolson case*. In this connection the court, Grim, J., said:

> "I am not unmindful of the decisions of the Supreme Court in Federal Base Ball Club v. National League, 259 U. S. 200, 42 S. Ct. 465, 66 L. Ed. 898, and in the very recent cases, decided November 9, 1953, of Toolson v. New York Yankees, Inc., (Kowalski v. Chandler, and Corbett v. Chandler,) 73 S. Ct. 78. In those baseball 'reserve clause' cases the Court dismissed anti-trust suits against the major professional baseball leagues on the theory that big-league baseball is a sport, local in its nature, and not interstate commerce. The only restriction alleged in the baseball cases was in the internal operation of professional baseball itself. The only question involved in those cases was whether professional baseball itself is interstate commerce. No question of restrictions on the sale of radio and television rights was involved in those cases. The present case, on the other hand, primarily concerns restrictions imposed by the National Football League on the sale of radio and television rights. Therefore, the present case basically concerns the League's restraint of interstate commerce in the radio and television industries. It is obvious that whether professional football itself is or is not engaged in interstate commerce is immaterial in the present case and that the decisions in the baseball cases referred to do not control the present case."

Relevant here as well as to the question of interstate commerce and federal pre-emption is *Commonwealth v. McHugh,* (Mass.) 93 N. E. (2d) 751, 763 (1950) (71 Supp. 516 D. C. Mass. (on remand)) which was an action against the officers and members of the Atlantic Fishermen's Union to restrain the defendants from continuing certain acts, arrangements, combinations, and practices alleged to be monopolistic in nature and a violation of the state anti-monopoly statute, having for their purpose the fixing and maintaining of prices of fish and to suppress competition and to restrain trade. There it was contended that the activities of the defendants were exempt from federal anti-trust laws, that the fishermen's union was a labor organization exempt from the federal antitrust laws and the court assumed that the operations of the defendants as fishermen occurred to a considerable degree in the stream of interstate or foreign commerce and that the restraints imposed by the defendants affected interstate commerce in addition to their affect upon intrastate commerce.

The court said: "If we are right in holding that the Federal statutes do not occupy the entire field to the exclusion of State law, we do not believe that any difference in the applicability to labor organizations of the Sherman Act as qualified by the Clayton Act and of the State law presents a conflict between the two systems, so that the State law cannot operate in this case. * * * But if we are wrong in this, we still do not think that there is a conflict between the two systems of law as applied to this or any particular case. This is simply an instance where the State

law is somewhat more inclusive than the Federal law as now amended. It would seem that in the absence of complete pre-emption of the field such differences are permissible, and that the State law may cover a form of monopoly which the Federal law no longer reaches."

The defendants say with positive personal assurance that the cases demonstrate that baseball is presently regarded as being in interstate commerce and that its antitrust exemption exists at the sufferance of Congress and that *Toolson* is a complete defense to the state's action. Of course, the court cannot blind itself to the *Toolson case* or to the *Radovich case*. But from an analysis of the cases the court is of the opinion that they do not have such lethal effect. They all involve the application of the Sherman Act to the internal aspects of baseball. They do not say that baseball's local activities are without the scope of, immune or exempt from state antitrust laws. They do not determine that the local aspects of this intrastate and interstate business are not subject to the state antitrust laws. In the court's opinion the cases decide only that the internal structure of baseball is outside of the scope of the federal antitrust laws and remains there unless and until Congress sees fit to include it within the purview of the Sheman Act. By a strong and reasonable inference they leave the field of state enforcement of its own laws against the locality of that business open as a matter of law. In the court's opinion *Commonwealth v. McHugh, supra* is strongly relevant to the situation here.

(b) The court is of the opinion that the alleged activities of the defendants are within the scope of the Wisconsin antitrust laws.

Section 133.01 (1) Stats. provides, in the first sentence:

> "Every contract or combination in the nature of a a trust or restraint of trade or commerce is hereby declared illegal."

The third sentence of that section provides:

> "Every person, corporation, copartnership, trustee or association who shall either as principal or agent become a party to any contract, combination, conspiracy, trust, pool or agreement herein declared unlawful or declared to be in restraint of trade, or who shall combine or conspire with any other person, corporation, copartnership, association or trustee or monopolize or attempt to monopolize any part of the trade or commerce in this state shall forfeit for each such offense not less than $100 nor more than $5,000."

Section 133.01 Stats. provides that "the several circuit courts may prevent or restrain, by injunction or otherwise, the formation of any such contract or combination or the execution of the purposes thereof."

In *Pulpwood Co. v. Green Bay P. & F. Co.*, 157 Wis. 604, 625, 147 N. W. 1058, the court pointed out that the state antitrust law was a copy of the federal statute and should be similarly construed. In *State v. Lewis and Leidersdorf Co.*, 201 Wis. 543, 549, 230 N. W. 692, the court referred to the state antitrust law as a reenactment of the first two sec-

tions of the Sherman Anti-Trust Act with application to intrastate as distinguished from interstate actions, and cited federal cases in its consideration of whether the complaint there stated a violation of the state antitrust law.

Numerous cases cited by the plaintiff here have been examined, from which the court concludes that the facts alleged in the complaint state a cause of action within Section 133.01 Stats.

The court has previously quoted the first and the third sentences of Section 133.01 Stats. The second sentence reads as follows:

> "Every combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, to be produced or sold therein or constituting a subject of trade or commerce therein, or which combination, conspiracy, trust, pool, agreement or contract shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this state, or fix any standard or figure in which its price to the public shall be in any manner controlled or established, is hereby declared an illegal restraint of trade."

The defendants consider the statute as a whole, maintain that major league baseball is not an article or commodity in general use in Wisconsin and is therefore not subject to the Wisconsin antitrust laws. They maintain that the statute has received such interpretation in *State of*

Wisconsin v. Coad A. LeSage, C. C. H. Trade Cases 1950-1951 Sec. 62000,592 as well as in a previous opinion of the attorney general.

In *LeSage* the court said: "Labor is not a commodity within the meaning given that word by the antitrust laws and the fixing of wages and commissions is therefore not unlawful." The defendants in *LeSage* were charged with agreeing to fix the price of caskets. They moved for summary judgment on the ground that only the fixing of labor costs was involved. The court held that where the cost of a complete piece of work includes both labor and materials, the use of a fixed wage rate as a basis for the whole price may justify a conclusion that the price of materials has been fixed. Since the record presented an issue of fact with respect to this question, the defendants' motion for summary judgment was denied. Plaintiff notes that in its complaint it charges restraints involving articles and commodities.

On February 9, 1949, Senate Bill No. 177, S was introduced by the Committee on Judiciary at the request of the attorney general to amend Section 133.01(1) Stats. The amendment was directed only to the second sentence of the statute and provided for the inclusion of the words "or service" between the words "commodity" and "in general use" in that sentence. The bill was tabled by a vote of 24 to 2. The bill did not propose to amend in any respect the first or third sentences of the section and the legislative action is not considered as lending support to the interpretation that the defendants would place upon it.

Defendants state that the office of the Attorney General of the State of Wisconsin has also rendered an opinion indicating that service businesses are not covered by the Wisconsin Statutes. The reference is to an opinion rendered on September 9, 1907, by F. L. Gilbert, the then attorney general of the state, to the Deputy Commissioner of Insurance in answer to an inquiry relating to an agreement of insurance companies regulating the commissions allowed their agents, which opinion is reported in Biennial Reports and Opinions, 1908, pages 495-496. Counsel correctly quote the attorney general. However, it should be noted that the attorney general gave his opinion on the provisions of Section 1791j of the Statutes of 1898 as amended by Section 7 of Chapter 907 laws of 1905. Reference to that Statute discloses that it related to combinations, conspiracies, trust pools, agreements or contracts intended to restrain or prevent competition in the supply or price of any article or commodity in general use in the state, substantially similar to the second sentence of the present statute.

Pulpwood Co. v. Green Bay P. & F. Co., supra at page 619 Wisconsin Reports indicates that the Wisconsin antitrust laws were intended to include the concept of restraint of trade as it developed at common law. In *Gatzow v. Buening*, 106 Wis. 1, 81 N. W. 1003, prior to the enactment of the Wisconsin antitrust law, the court held that a combination of liverymen to limit their services to persons patronizing them exclusively, and to monopolize the livery business, including service for funerals, was clearly unlawful as against public policy. The court referred to *Milwau-*

kee Masons & Builders' Association v. Nieserowski, 95 Wis. 129, 70 N. W. 166, where the court indicates that all combinations in restraint of trade were contrary to public policy and illegal unless actually and not unreasonably for the protection of parties dealing legally. If, therefore, the Wisconsin common law covered restraints of trade in service industries, then it would seem that Section 133.01(1) Stats. should be interpreted to apply to such services, it having also been held that the common law was codified in Section 133.01(1) Stats. and its predecessor statutes.

Defendants are of the opinion that the several statutory provisions are in *pari materia* and are not to be construed as isolated but as part of a single, complete and indivisible unit; that any other assumption would be highly unreasonable, that if sentence one and three were intended to apply to every kind of trade and commerce, sentence two would be redundant and unnecessary. It is equally true, however, that the legislative intent must be determined primarily by the language of the statute "which affords the best means of its exposition." The fact is that the words "commodity in general use" are specifically omitted from the first and third sentences of the statute and particularly in light of the legislative history, an interpretation that the second sentence is not a limitation on the entire statute is not inconsistent.

As noted by plaintiff, other courts in recent years have been confronted with the same question. In *Peoples Savings Bank v. Stoddard*, (Mich. 1960) 102 N. W. (2d) 777, the court rejected Toulmin's argument that banking should

not be subject to antimonopoly controls on the ground that it primarily deals with the furnishing of personal services. In *Fort Wayne Cleaners and Dyers Assn. v. Price* (Ind. 1956) 137 N. E. (2d) 738, 742, it was held that dry cleaners and dyers were engaged in "trade or commerce" as those words were used in the state's antimonopoly statute. See also *Atlantic Cleaners and Dyers v. U. S.*, 286 U. S. 427, 52 S. Ct. 607, 76 L. ed. 1204 (1932); *State v. Greater Cleveland Livery Owners Assn.* (Ohio 1947) 74 N. E. (2d) 104. The court is persuaded to the conclusion that it was the legislative intent in the second sentence of the statute to enumerate certain conduct and combinations which were clearly in restraint of trade and not to preclude thereby the inclusion within the scope of "trade or commerce," as traditionally defined, all except those specifically enumerated.

Section 133.05 Stats., is noted. It excludes from the antitrust laws labor, agricultural, or horticultural organizations, provides that such organizations, or the members thereof, shall not be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. It concludes with the sentence: "The labor of a human being is not a commodity or article of commerce." The court is of the opinion that the specific provision is limited to agreements between laborers and others rendering personal services fixing the rates and conditions at which they work. There is an obvious difference, however, between the furnishing of services by the employee and the employer's right to own, use and control the performance of such services. To this, in the court's opinion, the

statutory exception does not extend. See *McKinley Telephone Co. v. Cumberland Telephone Co.*, 152 Wis. 359, 362, 140 N. W. 38.

3.) The defendants next object on the ground that the complaint does not state any common law cause of action upon which relief may be granted. In this connection they state that no common law cause of action exists in the State of Wisconsin for restraint of trade and that the state's claim that the common law of Wisconsin has been violated should be disregarded. Reliance is had on *State v. Heugin*, 110 Wis. 189, 85 N. W. 1046, 1063; *State v. Milwaukee E. R. & L. Co.*, 136 Wis. 179, 116 N. W. 900 and *State v. Smith*, 19 Wis. (2d) 577, 120 N. W. (2d) 664.

In the *Heugin case* the court did say that contracts that operate merely in restraint of trade, even though unreasonable, were not actionable at all at the common law, that they were merely void and unenforceable. In *State v. Milwaukee E. R. & L. Co.*, the plaintiff sought, among other things, to suspend or remove the officers of private business corporations to, require an accounting and, ancillary thereto, to restrain one defendant from exercising any rights under and to set aside and annul a franchise. The court held that there was no cause of action which could be maintained by the attorney general in the name of the state for any of the relief sought. The court did note a distinction between the State of Wisconsin and the attorney general and stated that the powers of the latter are strictly limited. The court said: "He is a constitutional officer, but by the constitution he is given only such powers as 'shall be pre-

scribed by law.' Sec. 3, art. VI, Const. It is therefore essential to the maintenance of an action brought by the attorney general *ex officio* and *sua sponte* that we should find some statute authorizing it." In *State v. Smith* (an application for the writ of mandamus requiring the state treasurer to sign a state voucher) the court reiterated that the attorney general has no common-law powers.

Combinations or contracts unreasonably suppressing competition or restraining trade are illegal and void at common law. The state antitrust law does not supersede the common law, but is declaratory of it, complements it, extends it and "makes the enforcement of the public policy involved at common law more effective."

The court is satisfied that the statutory prescription authorizing the attorney general to bring and maintain this action is to be found in sections 133.01(2), 14.52 and 14.53 of the Statutes. This specific statutory construction is not in conflict with section 14.53.

It would also seem a reasonable conclusion that in any action for the enforcement of the provisions of Ch. 133 Stats., the attorney general is also enforcing the common-law concepts of restraint of trade. The attorney general is authorized and charged with the enforcement of the state's antitrust laws; to require the governor's authority or legislative permission (Senate or Assembly) for him to allege that the acts of the defendants were violative of the common law would be a most unreasonable and unnatural interpretation of the statutes.

4.) Defendants assert that the challenged activities of the National League and its members are essentially national and interstate in scope and character and that the full occupation of the field of interstate commerce that is represented by the Sherman and Clayton Acts leaves no room for independent state regulation of the same subject.

The plaintiff concedes that the business of baseball involves certain aspects of interstate commerce but states that it here charges only violations of its laws respecting those aspects of the defendants' activities which have substantial impact within the state; that the charges clearly set forth violations of the Wisconsin antitrust laws. In this connection the state maintains that under the principles of concurrent regulation under the state and federal antitrust laws the defendants' contentions are not well taken.

The power to regulate interstate and foreign commerce is vested exclusively in Congress by the commerce clause of the Federal Constitution, subject only to constitutional prohibitions and limitations. But while the constitutional grant to Congress to regulate interstate commerce impliedly forbids the exercise of such power by the states, it does not withdraw from the states power to legislate in respect to local matters (particularly in the exercise of the police power) even though such legislation may incidentally affect interstate commerce. It may be said as a general rule that where federal legislation indicates an intent to occupy or regulate the particular subject matter exclusively, an intent that such legislation should be paramount, a state statute on the same subject matter must yield;

where, however, the federal regulation is not intended to take legislative control of the precise subject matter or occupies a limited field or aspect of the subject matter, the state law is not superseded. In such cases the state may have "concurrent jurisdiction." The criteria for such determinations are referred to in *Pennsylvania v. Nelson*, 350 U. S. 497, 520, 76 S. Ct. 477, 100 L. ed. 640, where it was held that the federal sedition laws superseded the enforceability of the Pennsylvania Sedition Act on the ground of the dominant interest of the federal government and by the fact that the state act would conflict with the operation of the federal plan. It is submitted that the numerous cases cited by both sides to this case justify the foregoing conclusions however poorly they may be stated. The cases clearly demonstrate that the fact that the Sherman Act is coextensive with the commerce clause of the United States Constitution does not evidence any Congressional attempt to pre-empt the operation of the state antitrust laws. It has been repeatedly stated "that the historic police powers of the States were not to be superseded by the Federal Act, unless that was the clear and manifested purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 67 S. Ct. 1146, 91 L. ed. 1447 (1947). The court there also pointed out that "it is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the states undisturbed except as the state and federal regulations collide."

The legislative history of the Sherman Act and the cases interpreting it indicate that it was the intention of

Congress to supplement and not displace state antitrust law. In connection with the legislative history see statement of Senator Sherman.*

Cases support the conclusion that state and federal antitrust laws may operate concurrently and that the enforcement of a state antitrust law may affect interstate activities which may also be in violation of the federal antitrust laws. Reference is here made to *Standard Oil Co. v. State of Tennessee, ex rel. Coates,* 217 U. S. 413, 30 S. Ct. 543, 54 L. ed. 817 (1910); *Straus v. American Publishers' Association,* 231 U. S. 222, 34 S. Ct. 84, 58 L. ed. 192; *United States v. South-Eastern Underwriters Association,* 322 U. S. 533, 64 S. Ct. 1162, 88 L. ed. 1440; *Mathews Conveyor Co. v. Palmer-Bee Co.,* 135 F. (2d) 73, 82 (6th Cir. 1943); *Commonwealth of Massachusetts v. McHugh,* 17 F. Supp. 516 (D. C. Mass. 1947).

In *United States v. South-Eastern Underwriters Association* in referring to intrastate and interstate activities the court said: "* * * In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and

*This bill . . . has for its . . . object to invoke the aid of the courts of the United States to deal with the combinations . . . when they affect injuriously our foreign and interstate commerce . . . and in this way to supplement the enforcement of the established rules of the common and statute law by the courts of the several states in dealing with combinations that affect injuriously the industrial liberty of the citizens of those states. It is to arm the federal courts within the limits of their constitutional power that they may cooperate with the state courts in checking, curbing and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States." 21 Cong. Rec. 2457 (1890).

national interests involved can be accommodated. And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory and tax laws should be declared valid."

The defendants quote from *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293, 299, 65 S. Ct. 661, 89 L. ed. 951 (1945): "Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.' " Taken at its face value, the import of the language quoted could put an end to the power of the states to enforce their own antitrust laws where interstate commerce was at all affected. Counsel, however, quote only a part of the statement of the Supreme Court. They omit what precedes the quoted language, namely: "And with reference to commercial trade restraints such as these * * *."

In this case the defendants, who were producers, wholesalers and retailers of alcoholic beverages, were indicted for having conspired and combined to restrain commerce in violation of the Sherman Act. Specifically the defendants were charged with conspiring to raise, fix and maintain retail prices. In substance, the defendants maintained (1) that their price fixing applied only to retail sales which were wholly intrastate and (2) that the state's power to control the liquor traffic within its boundaries (21st Amendment, U. S. Constitution) made the Sherman Act inapplicable. The court noted, however, that the local activity

had the ultimate effect of coercing wholesalers and thus reached beyond the boundaries of the state. The court said: "Whatever was the ultimate object of this conspiracy, the means adopted for its accomplishment reached beyond the boundaries of Colorado. The combination concerned itself with the type of contract used in making interstate sales; its coercive power was used to compel the producers of alcoholic beverages outside of Colorado to enter into price maintenance contracts. Nor did the boycott used merely affect local retail business. Local purchasing power was the weapon used to force producers making interstate sales to fix prices against their will." In connection with the second defense it was held that the Sherman Act was not being enforced in such a manner as to conflict with the regulatory law of the state nor apply to defeat the policy of the state.

The question involved in Frankfort Distilleries is somewhat in reverse of the question in the instant case. It was concerned with the extent of the Sherman Act to reach a local activity which had an ultimate effect on interstate commerce. It did not concern the prerogative of the state to enforce its own antitrust laws in any case having interstate implications. Were it otherwise, it would indeed be difficult to reconcile with subsequent decisions.

Defendants in maintaining that the full occupation of the field of interstate commerce that is represented by the Sherman and Clayton Acts leaves no room for independent state regulation refer to *Gibbons v. Ogden*, 22 U. S. 23, 9 Wheaton 1 (1824), where the Supreme Court struck down several legislative acts of the State of New York granting

to Livingston and Fulton for a term of years the exclusive navigation of all the waters within the jurisdiction of the state with boats propelled by fire or steam, as repugnant to the commerce clause of the federal Constitution. Congress had passed an act regulating navigation under the commerce clause and it was held that the state laws inhibiting the use of any vessel for every commercial purpose authorized by the federal act came in "direct collision" with the federal act.

Gibbons v. Ogden was decided some 66 years before the enactment of the Sherman Act and 28 years before *Cooley v. Board of Wardens of the Port of Philadelphia, infra*, and it did not hold that states could not legislate on matters affecting commerce even in the absence of such legislation by Congress in the exercise of its powers under the federal commerce clause. And that was made clear in *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 Howard (53 U. S.) 299, 13 L. ed. 996 (1851), where a state law requiring and regulating the use of a pilot was held valid. As a regulation of navigation the law was a regulation of commerce. The court held "that the mere grant to Congress of the power to regulate commerce, did not deprive the States of the power to regulate pilots, and that although Congress has legislated on the subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States." The court later in its opinion added that the state law did not "conflict" with any law of Congress.

Following this, in *Charleston & W. C. R. Co. v. Varnville Furniture Co.*, 273 U. S. 597, 604, 35 S. Ct. 713, 717, 59 L. ed. 1137 (1915) which was an action to recover from the (interstate) carrier a penalty under a South Carolina statute for failure to pay a damage claim within 40 days. It was contended that the law imposing the penalty was invalid as a regulation of interstate commerce, and the court did hold it invalid as a measure which overlapped the federal law regulating the subject of a carrier's liability for loss or damage to interstate shipments, both in respect of the subjects, the grounds and the extent of liability for loss. It is not so much the decision on the facts of the case which created a real question of when states may legislate with respect to matters affecting interstate commerce but rather the broad statement made by the court that "when Congress has taken the particular subject matter in hand, coincidence is as ineffective as opposition." While the statement seemed to put aside any rule of any conflict or burden as well as supplemental or concurrent jurisdiction in the states, so far as any intrastate affect was concerned, it would seem that subsequent decisions have explained this statement if they have not modified it. For example, see *Rice v. Santa Fe Elevator Corporation*, 331 U. S. 218, 67 S. Ct. 1146, 91 L. ed. 1447 (1947), an action brought by warehousemen operating public warehouses for the storage of grain in Illinois to restrain the Illinois Commerce Commission from proceeding under state regulatory laws. The warehouses were engaged in the storag of grain for interstate or foreign commerce and were therefore in the field of federal domain. Their ware-

houses were operated under licenses issued by the Secretary of Agriculture pursuant to the United States Warehouse Act. It was argued that the federal act should be construed to mean that the subjects which the secretary's authority touches may not be regulated in any way by any state agency and indeed the court did conclude from the legislative history that it was the legislative purpose to make the federal act "independent of any State legislation on the subject." Nine matters were held to be beyond the reach of the Illinois Commission since on each one Congress had declared its policy in the federal act, and the provisions of the state law on those subjects had to give way by virtue of the supremacy clause. But the state's jurisdiction to regulate three matters not covered in the federal act was upheld. As to these the court said: "Congress has not foreclosed state action by adopting a policy of its own on these matters. Into these fields it has not moved. By nothing that it has done has it pre-empted those areas."

"An express saving of state laws by congressional act regulating interstate commerce is not essential. The congressional purpose to exclude local laws must be clearly manifested and conflict in terms between federal and state statutes must clearly appear in order to justify holding that state regulations are invalid." *California v. Zook*, 336 U. S. 725, 69 S. Ct. 841, 93 L. ed. 1005. Here the state law making it unlawful to sell or arrange for interstate transportation of persons over the state's public highways without a permit from the Interstate Commerce Commission was held

not to conflict with the federal Motor Carrier Act, which had substantially the same provision, and was held valid.

Direct reference to what the court said in the *Varnville case* is made in *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U. S. 714, 83 S. Ct. 1022, 10 L. ed. (2d) 84 (1936), where the enforcement of the state's Anti-Discrimination Act as to the hiring of pilots by an interstate air carrier was resisted on the constitutional ground that the federal law had pervasively covered the field of protecting people in interstate commerce from racial discrimination in employment. The basis of the objection to the validity of the state law was *Charleston & W. C. R. Co. v. Varnville Furniture Co., supra.*

Referring to its ruling in *California v. Zook, supra,* the court said: "But this court has also said that the mere 'fact of identity does not mean the automatic invalidity of state measures.' To hold that a state statute identical in purpose with a federal statute is invalid under the Supremacy Clause, we must be able to conclude that the purpose of the federal statute would to some extent be frustrated by the state statute. We can reach no such conclusion here."

The defendants further refer to *Kosuga v. Kelly*, 257 F. 2d 48 (U. S. C. A. 7th Cir.) (1953). That was an action by the seller of onions against the buyer for damages for breach of contract.

In the contract the buyer and seller covenanted not to sell onions on the future's market, thus attempting to

control the market price. The buyer counterclaimed that the agreement was illegal under the Illinois Antitrust Act. The court held that the transaction involved interstate commerce and therefore the Illinois Antitrust Act was without application. The court there did cite as authority 15 C. J. S. Commerce Sec. 133(b) where it is stated that "state antitrust laws do not apply to transactions involving interstate commerce * * *."

It is true that it is not clear from the opinion whether the court based its decision on pre-emption or a construction of the Illinois Antitrust statute. It is noted that the court did also hold that the defense could not be raised in an action for the recovery of the purchase price of goods where it was not sought to enforce the illegal condition, giving the statute a narrow construction; and also found that the transaction was not violative of the Illinois Act, even though its applicability be assumed. The court has examined the cases cited as authority for the statement in C. J. S. (Footnote 35) and doubts that they fully support the statement. *Continental Securities Co. v. Michigan Cent. R. Co.*, 16 F. 2d 378 (C. C. A. 6th Cir.) appears to be clearly a pre-emption case. *Standard Oil Co. v. State*, 100 S. W. 705 (Ten.) (1907) concerned a construction of the Tennessee Antitrust Law which was sustained so far as it related to domestic commerce, though it also contained clauses invalid as attempting to regulate interstate commerce. *General Investment Co. v. New York Cent. R. Co.*, 23 F. 2d 822 (C. C. A. 6th Cir.) involved exclusive federal jurisdiction in the interstate commerce commission over the subject matter under the transportation act. Two other

cases in support of the C. J. S. statement on which *Kosuga* is apparently based, are cited in the 1965 Cumulative Pocket Part. *Peterbilt-Southern Sales Inc. v. Pacific Car & Foundry Co.*, 325 F. 2d 420 (U. S. C. A. 5th Cir.) involved the defense to an account which the court said related to a transaction which was in interstate commerce and therefore not subject to the Texas Antitrust Statutes; no facts are given and the court does refer to cases involving the successful assertion of such defenses under the state law where the transactions were intrastate in character. *Hercules Powder Co. v. State Board of Equalization*, 208 P. 2d 1096 (Wyo. 1949) was a proceeding for the abatement of an alleged invalid assessment of a sales tax, concerned the question of "doing business" within the state so as to be subject to the tax.

Kosuga was appealed and affirmed, 358 U. S. 516, 79 S. Ct. 429, 3 L. ed. 2d 475. It should be noted, however, that petitioner's defenses of illegality under the Commodity Exchange Act and the Illinois Antitrust Act, interposed in the court below, were not preserved and therefore were not issues on the appeal.

In *Henry G. Meigs, Inc. v. Empire Petroleum Company*, 273 F. 2d 424, 430, the court held that a price-fixing provision in a contract was not limited to intrastate commerce but also applied to interstate commerce and violated both the Wisconsin and federal price-fixing statutes. The court there distinguished the *Kosuga* case, noting that in *Kosuga* the court held a similar Illinois statute not applicable to interstate commerce but only to intrastate commerce.

Defendants also refer to *Paramount Publix Corp. v. Hill*, 11 F. Supp. 478 (1932) from this federal district. There the court restrained the Wisconsin Department of Agriculture and Markets from continuing and investigating unlawful trade practices under the defendant's petition alleging that the plaintiffs (all non-residents but licensed to do business within the state) violated Sec. 99.14 Wis. Stats., in that they employed unfair, oppressive and coercive practices in the sale and purchase of motion pictures in the state and in the application of protective arrangements. The court was of the opinion that the activity charged was within the exclusive power of the federal government in light of the interstate commerce and national legislation (the copyright, antitrust and Federal Trade Commission Laws) "whose exercise operates to dominate and by dominating, excluding possibility of concurrence." The case was persuasive with the trial court in *State v. Allied Chemical & Dye Corp.*, 9 Wis. (2d) 290, 110 N. W. (2d) 133. But see *Leader Theatre Corp. v. Randforce Amusement Corp.*, 58 N. Y. S. (2d) 304, 307 (1945) where plaintiff alleged a conspiracy to restrain trade and competition in violation of the General Business law of the State of New York commonly known as the Donnelly Act. Defendant, Twentieth Century-Fox Film Corporation, produced motion pictures and distributed them throughout the United States, including New York. It was noted that in an action brought under the Sherman Antitrust Act for the acts complained of in this proceeding, a court would be "constrained" to hold that interstate commerce was involved. The fact that interstate commerce was involved did not

preclude the applicability of the Donnelly Act. The court said:

(Page 307) "It is now well established that states, under their police power, can enact and implement legislation which affects interstate commerce, when such commerce has significant local consequences. * * * Of course, state legislation which conflicts with federal legislation * * * or which discriminates against interstate commerce, is unconstitutional. * * * And state legislation purporting to affect interstate commerce is likewise ineffective if such state legislation has been specifically precluded by Congressional action.

"But the foregoing cases, limiting state regulatory power under the Commerce Clause of the United States Constitution, apparently contemplate an actual or implied conflict in the state and federal laws, or state legislation on an activity which has no local consequences and is exclusively interstate in character. For it has been held that state legislation which implements federal legislation is permissible although that state legislation relates to an activity almost entirely interstate in nature. *Parker v. Brown,* 317 U. S. 341, 63 S. Ct. 307, 87 L. ed. 315. * * * More particularly, the Supreme Court of the United States has sustained the applicability of a state antitrust act while the Sherman Act was in effect, although that state act affected interstate commerce. *Standard Oil Co. of Kentucky v. State of Tennessee,* 217 U. S. 413, 30 S. Ct. 543, 54 L. ed. 817. Indeed, the joint applicability of the Sherman Act and state antitrust legislation has scarcely ever been questioned. *Paine Lumber Co. v. Neal,* 2 Cir., 212 F. 259, affirmed 214 F. 82, affirmed 244 U. S. 459, 37 S. Ct. 718, 61 L. ed. 1256; *Straus v.*

American Publishers Assn., 231 U. S. 222, 34 S. Ct. 84, 58 L. ed. 192, L. R. A. 1915A, 1099."

Among state cases cited in support of the principle that the Sherman Act does not prevent state antitrust laws from applying to activities which might also violate the federal antitrust laws, see *State v. Southeast Texas Chapter of National Electrical Contractor's Association*, 358 S. W. (2d) 711 (1962); *Commonwealth v. McHugh* (Mass.) 93 N. E. (2d) 751 (1950); *State v. Sterling Theatres Co.* (Wash.) 394 P. (2d) 226, 228 (1964) (following *Leader Theatre Corp. v. Randforce Amusement Corp., supra*).

In *Commonweatlh v. McHugh, supra*, the court conceded that a large part of the defendants' fishing operations were in interstate commerce, that defendants' activities in restraint of competition and price fixing in the industry resulting in great loss to the people of the Commonwealth of Massachusetts also affected interstate commerce. The court held the state's antitrust law applicable to the intrastate activity, a matter of local concern, although interstate commerce in the industry was, obviously, to a great extent affected. There the court said:

"(10) 7. We are not prepared to accept the defendants' contention that their activities, being in the field of interstate commerce, are wholly within the Federal jurisdiction; that the Sherman Act, U. S. C. (1946 ed.) Title 15, secs. 1, 2, 15 U. S. C. A. secs. 1, 2 and the Clayton Act. U. S. C. (1946 ed.) Title 15, sec. 17, 15 U. S. C. A. sec. 17 (withdrawing labor organizations to some extent from the operation of the first two sections), occupy the entire field to the total exclusion of State law.

"We assume without discussion that the operations of the defendants as fishermen occur to a considerable degree in the stream of interstate or foreign commerce both because of the sale and transportation of a substantial portion of the product to other States after it is landed, and because the produce comes from the high seas. (The Abby Dodge, 223 U. S. 166, 32 S. Ct. 310, 56 L. ed. 390), and we further assume that the restrains imposed by the defendants affected that commerce in addition to their effect upon intrastate commerce. But we are not yet convinced that the State anti-monopoly law has been entirely superseded except in that narrow class of cases in which a monopolistic practice has little or no effect upon interstate commerce. To the best of our knowledge most of the States have constitutional provisions or statutes on this subject, many of them adopted subsequent to the Sherman Act. These enactments are outgrowths of long established common law doctrines and were designed to extend and adapt those doctrines to the needs of the time and locality as seen by the local law making bodies. These needs still exist, notwithstanding the Sherman Act. Monopolies and restraints of trade are of infinite form and variety. They range in extent and importance from that which is inconsequential to that which is of the utmost consequence. Some expend their effects almost wholly upon intrastate commerce and are of only local interest and some almost wholly upon interstate commerce and so become matters of national concern, and there are all gradations between. In many cases it would be very difficult to draw the line. If State laws have no force as soon as interstate commerce begins to be affected, a very large area will be fenced off in which the States will be practically helpless to protect their citizens with-

out, so far as we can perceive, any corresponding contribution to the national welfare. See *Duckworth v. State of Arkansas*, 314 U. S. 390, 394, 62 S. Ct. 311, 86 L. Ed. 294, 138 A. L. R. 1144. Especially is this true in view of the immense broadening in the conception of interstate commerce in recent years. In general, the purposes of the State and Federal laws are the same. Certainly that is true of our statute and the Sherman Act. If there should be conflict between the State law and the Federal law, the Federal law would of course prevail whenever interstate commerce was involved. A State court should be thoroughly convinced before it abandons jurisdiction over subjects that historically have been within the competence of the State, lest it discover later that it has retreated where the Federal government will not advance and has therefore been derelict in its duty. We should be assuming a heavy responsibility if we were to take the position that the great existing mass of State legislation to which we have referred is, and every since 1890, has been, so limited in practical usefulness. The Supreme Court of the United States has often in various forms reiterated the caution expressed in *Illinois Central Railroad Co. v. State Public Utilities Commission of Illinois*, 245 U. S. 493, 510, 38 S. Ct. 170, 176, 62 L. Ed. 425, in these words, 'In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested.' See cases collected in dissenting opinion of Mr. Justice Frankfurter in *Hill v. State of Florida*, 325 U. S. 538, 549-552, 65 S. Ct. 1373, 89 L. Ed. 1782. State courts especially

should heed the warning. We do not think that such purpose is 'clearly manifested' in this instance. We have seen no case holding that Federal legislation has, in general, displaced State antitrust laws. In *People of Puerto Rico v. Shell Co.* (P. R.), Ltd., 302 U. S. 253, 58 S. Ct. 167, 82 L. Ed. 235, it was held that a statute of Puerto Rico closely following the form of the Sherman Act could be enforced in the local courts, largely on the ground that the Legislature of Puerto Rico had powers almost as broad as those of the Legislature of a State. See *Standard Oil Co. of Kentucky v. State of Tennessee*, 217 U. S. 413, 421-422, 30 S. Ct. 543, 54 L. Ed. 817; *Commonwealth v. Strauss*, 191 Mass. 545, 555, 78 N. E. 136, 11 L. R. A. N. S. 968, 6 Ann. Cas. 842; writ of error dismissed sub nomine *Strauss v. Commonwealth*, 207 U. S. 599, 28 S. Ct. 253, 52 L. Ed. 358; Opinion of the Justices, 211 Mass. 620, 623, 99 N. E. 294; *Ritholz v. Ammon*, 240 Wis. 578, 4 N. W. 2d 173. Nothing will be accomplished by a discussion on our part of more or less analogous Federal cases. Our views are not final in any event. It is enough for the present that there are cases which give us reason to thank that the Federal and State laws may operate together, even if in some aspects a monopoly which violates State law also tends to restrain interstate commerce. The statement found in *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U. S. 427, 435, 52 S. Ct. 607, 609, 76 L. Ed. 1204, and repeated in later cases, 'A consideration of the history of the period immediately preceding and accompanying the passage of the Sherman Anti-Trust Act and of the mischief to be remedied, as well as the general trend of debate in both Houses, sanctions the conclusion that Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations, and conspiracies in restraint of trade, and to that end to

exercise all the power it possessed', appears to us from the context to have referred to the inclusive nature of the 'restraint' intended to be reached and does not seem to have had reference to the exclusion of State laws. See *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 495, 60 S. Ct. 982, 84 L. Ed. 1311, 128 A. L. R. 1044."

State v. Allied Chemical & Dye Corp., supra was an action brought under the state's antitrust law to restrain a combination and conspiracy in restraint of trade and in establishing uniform prices at which calcium chloride was sold to Milwaukee County and other users thereof in Wisconsin. Certain of the defendants moved separately for summary judgment dismissing the complaint as to them. Each asserted that all sales of calcium chloride made by and in Wisconsin were made in interstate commerce and that all of its business referred to in the complaint is subject to the laws of the United States relating to monopoly and restraint of trade commonly referred to as the Sherman, Clayton, Robinson-Patman and Federal Trade Commission Acts, which acts and the enforcement thereof by the federal government pre-empted the field of regulation of interstate commerce respecting monopoly and restraint of trade. Reference to the record indicates that proceedings had been brought against the defendants (a predecessor of one) by the Federal Trade Commission and under date of December 13th, 1938, the Commission entered an order to cease and desist. There was substantial identity between the Commission's findings and the allegations of the plaintiff's complaint. Not only that, in the case of the defendant, the Dow Chemical Co., the Federal Trade Commission had conducted two compliance investigations, one in 1951,

another in 1953. A third was instituted in May, 1957, and was preceding during the pendency of the state action. The 1951 investigation covered the period of the preceding five years; the 1957 compliance investigation extended to activities of Dow since January 1, 1953. In the case of the defendant, Columbia-Southern Chemical Corporation, the Federal Trade Commission conducted various compliance investigations up to November, 1956. And on May 29, 1957, the Federal Trade Commission instituted another compliance investigation covering defendants' activities since January 1, 1953. A compliance request was directed to defendant, Wyandotte Chemicals Corporation, in 1951; an investigation identical to that in the case of co-defendants instituted in May, 1957. In the case of the defendant Wyandotte additional investigation was taken by the Federal Trade Commission in September, 1958. The trial court was of the opinion that the Federal Trade Commission had taken jurisdiction over practices which the state sought by their action to deal with and that the state was precluded from enforcing the state statutes and the court granted summary judgment. On appeal it was held that there was no language in the federal enactments that pre-empted the field of regulation and enforcement in the federal government or that precluded the state from acting under its police powers in the making and enforcement of the statutes dealing with such unlawful practices as combinations and conspiracies in restraint of trade and unfair methods of competition.

On the record before the court on demurrer the court concludes that defendants' interstate activities do not pre-

vent application of the Wisconsin antitrust laws to remedy substantial injuries to trade and commerce within the state.

5.) Defendants next say that the court must hold as a matter of substantive law that the relief sought by the State would impose an unreasonable burden upon interstate commerce.

Among other cases, they cite *Southern Pacific Co. v. Arizona,* 325 U. S. 761, 65 S. Ct. 1515, 89 L. ed. 1915 (1945) holding invalid the state's law regulating train lengths, and *Morgan v. Commonwealth of Virginia,* 328 U. S. 373, 66 S. Ct. 1050, 90 L. ed. 1317 (1946), holding invalid the defendant's statute relating to the segregated seating of passengers of public motor carriers according to color. The constitutional objection in each case was that the statutory regulation unlawfully burdened interstate commerce. See also *South Covington Ry. v. Covington,* 235 U. S. 537, 35 S. Ct. 158, 59 L. ed. 350 (1915), (part of local ordinance regulating the number of cars to be run and the number of passengers in each car, between interstate points, held invalid as directly affecting and burdening interstate commerce); *Bibb v. Navajo Freight Lines, Inc.,* 359 U. S. 520, 79 S. Ct. 962, 3 L. ed. 2d 1003 (1959) (Illinois statute requiring certain type of rear fender mudguards on trucks and trailers, held an unconstitutional burden on interstate commerce). *Bethlehem Steel Co. v. New York State Law Rel. Bd.,* 330 U. S. 767, 773, 67 S. Ct. 1026, 1030, 91 L. ed. 1234 (1947).

Defendants note from these cases that state regulation must not "materially interfere" with interstate commerce

and that those phases of national commerce which require uniformity of treatment must be free of state regulation.

In the court's opinion the allegations of the complaint that the Wisconsin antitrust laws apply to the activities of the defendants do not impose an unconstitutional burden upon interstate commerce.

The complaint alleges substantial injuries to trade and commerce within Wisconsin. The applicable test is stated in *Parker v. Brown*, 317 U. S. 341, 362, 63 S. Ct. 307, 319, 87 L. ed. 315 (1943), where it is said: "* * * When Congress has not exercised its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and the national interests involved."

Cases cited by the defendants for the most part relate to regulations of the instrumentalities of interstate commerce. It does not appear that the plaintiff in the enforcement of its antitrust law proposes, as to the activities alleged, to impose any continuing regulation over any carrier or tool of commerce which would impede the free flow of commerce among the states. The activities alleged, within the state law, place a restraint and burden on trade and commerce. In *Mayer Brothers Poultry Farms v. Meltzer*, 80 N. Y. S. (2d) 874 (1948) the court said:

> "The question whether state jurisdiction has been ousted is accustomed to arise where a state has imposed

a burden upon interstate commerce (e.g. State of Missouri ex rel. Barrett v. Kansas Natural Gas. Co., 265 U. S. 298, 44 S. Ct. 544, 68 L. ed. 1027), not where, as here, the state law prevents burdens from being laid upon commerce, whether interstate or intrastate."

The requirement of uniformity of regulation does not oust the state of jurisdiction. Only diversity of state regulation or a high degree of probability of such diversity burdens interstate commerce. See *Huron Portland Cement Co. v. City of Detroit*, 362 U. S. 440, 80 S. Ct. 813, 4 L. ed. 2d 852 (1960); *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28, 68 S. Ct. 358, 92 L. ed. 455 (1948).

See also *State v. Sterling Theatres Co.*, (Wash.) 394 P. (2d) 226.

Diversity of state regulations was controlling in *South Covington Ry.* (between South Covington, Kentucky, and Cincinnati, Ohio) and in the *Bibb case* (between Illinois and Arkansas).

Upon the record before the court on demurrer the court cannot determine that there is such diversity of regulation.

6.) The complaint is further challenged on the ground that ouster of an offending corporation is mandatory under the statutory plan.

Here the defendants refer to sections 133.21, 133.22 and 133.23, Stats., providing for the forfeiture and cancellation of the charter and certificate of authority to transact business in the state of any corporation which engages in a

combination or conspiracy in restraint of trade. And in *State v. Retail Gasoline Dealers Association,* 256 Wis. 537, 543, 544, 41 N. W. (2d) 637, it was held that when a corporation has been adjudged a violator of section 133.01 Stats., judgment decreeing the forfeiture of its corporate charter is mandatory.

However, subsequent to that decision the statute was amended, so that section 133.245 relating to an action to cancel or revoke a corporate charter or a license or authority to do business in this state, provides:

> "In an action to forfeit, cancel, revoke or annul the charter of any corporation organized under the laws of this state, or the license or authority to do business in this state of any foreign corporation, or to enjoin any such corporation from doing business in this state, because of violation of any provision relating to the unlawful restraint of trade of commerce, judgment for such forfeiture, cancellation, revocation, annulment or injunction may, upon such terms as the court shall deem just and in the public interest, be rendered by the court, but only upon proof of a substantial and willful violation of such statutory provision."

By the plain language of the statute it appears that ouster is a discretionary remedy; it may be adjudged upon terms and in the public interest and only upon proof of a substantial and willful violation of section 133.01.

7.) The court finds no merit in the objection that several causes of action have been improperly united in this action.

The basis of the defendants' objection is that the so-called private parties—the County of Milwaukee and those seeking a baseball franchise for Milwaukee—will benefit from the injunctions sought here; that the State has no interest in the injunctive relief. Hence it is contended that the complaint sets forth two causes of action, one for a forfeiture and another for injunctive relief—each affecting and benefiting different parties, resulting in a misjoinder of actions.

The fallacy in the defendants' contention, as the court sees it, is that it overlooks the fact that the attorney general is charged with the duty of enforcing the state's anti-trust law and recovering the statutory forfeitures for violations. Sec. 133.01 (2) Stats. and section 133.02 also provides for the injunctive remedy. There is one primary right in the state.

As plaintiff notes, in virtually every such case the injunctive relief will benefit the public and competitors of the defendants. Such circumstance will not defeat the right of the state to enforce its law; neither does it make those parties incidentally benefited the real parties in interest. This has been noted in connection with federal enforcement. See *United States v. Fitzgerald*, (C. C. A. 8, 1912) 201 F. 295.

A somewhat similar objection on demurrer appears to have been made in *State v. P. Lorillard Co.*, 181 Wis. 347, 361, 193 N. W. 612, where the court said: "* * * Nor is there any doubt that the state is charged with the right and duty to protect the pubic from the burden of excessive prices when caused by such combinations."

The defendants refer to *Harwarden v. The Youghiogheny & Lehigh Coal Co.*, 111 Wis. 545, 87 N. W. 472, as authority for misjoinder of causes here. There the plaintiff's complaint stated two causes of action, one at law, by the plaintiff, a retail coal dealer, to recover damages of the defendants for the malicious destruction of his business, resulting from an alleged conspiracy by the defendants, the other a cause in equity by the plaintiff on his own behalf and on behalf of many others similarly situated to restrain the further enforcement of the alleged conspiracy. As the first cause of action affected but one party plaintiff, whereas the second cause of action affects numerous parties plaintiff, the general demurrer to the whole complaint on the ground of improper joinder was sustained. The court noted the doctrine that the several causes of action for or against a person must affect him in the same capacity in order to make them capable of being joined.

State v. P. Lorillard, supra, included causes for forfeiture and injunctive relief. After distinguishing the *Harwarden case,* the court said (181 Wis. 365, 366):

> "We have then this situation: A statute declares illegal such combinations as are described in the complaint, provides penalties for its violation, and requires the attorney general to enforce the provisions of the act. Another statute, sec. 1747*f*, makes provision for restraining by injunctions violations of the law forbidding unlawful combinations of the character described in the complaint. Other statutes provide for the cancellation of charters and licenses of offending corporations which conspire and combine to prevent competition, or control prices of articles in general use.

"When actions are brought to prevent such combinations, the consequences to different defendants, for example foreign and domestic corporations, are different in some respects. Does it follow from this that in order to enforce the provisions of the act a separate suit must be brought against every individual and every corporation joining in the conspiracy for penalties, and that a separate suit must be brought against every member of the combination if a cancellation of its license or charter is contemplated? We do not think so. We are disposed to the view that the primary right of the state is to prevent the continued violation of the statute by means of the combination alleged to be unlawful. This is a matter of far greater importance than the collection of the penalties.

"The delict of the defendants is the conspiracy alleged and their acts in its execution. The primary right and duty of the state and the wrong of the defendants constitute the cause of action, and we regard it as one cause of action, although as incidental to it there may be different forms of relief as against the different defendants.

"Hence it is our conclusion that there is no misjoinder of causes of action."

This is an action brought by the plaintiff in its primary right to enforce the state's antitrust law. It is not brought for the benefit of private parties. See also *United States v. Cotton Valley Operators Committee* (W. D. La. 1948), 75 F. Supp. 1.

8.) Defendants' last objection presents the question of whether the Fulton County Recreation Authority is an indispensable party to the action.

The defendants note that the plaintiff has charged the defendant Braves with making illegal contracts with the City of Atlanta and the Fulton County Recreation Authority, which is not a party to the action; they also say that the complaint, in essence, demands and the plaintiff seeks, the severing of these allegedly illegal contractual relations. In this situation, they maintain, that the Fulton County Recreation Authority is a necessary party to the action. Defendants confirm their conclusion by the application to this case of the four tests for the determination of indispensability discussed in *State of Washington v. United States,* (C. C. A. 9, 1936) 87 F. 2d 421.

The determination of the objection on demurrer, however, must be made on the basis of the complaint and the nature of the proceeding. The action is brought by the plaintiff to enforce its antitrust laws and it does not appear from the record before the court that it will be necessary to construe the lease with the Fulton County Recreation Authority. And the plaintiff has no obligation in law to join the Fulton County Recreation Authority for the protection of the defendants.

In *State of Washington v. United States,* the court, at page 426, also said:

> "In Williams v. Bankhead, 86 U. S. (19 Wall.) 563, 571, 22 L. Ed. 184, it is said: 'The true distinction appears to be as follows: First. Where a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. Secondly. Where a person is interested in the

controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached. Thirdly. Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant.'"

In *National Licorice Co. v. National Labor R. Board*, 309 U. S. 350, 363, 60 S. Ct. 569, 577, 84 L. ed. 799 (1940), the court said:

"But different considerations may apply even in private litigation where the rights asserted arise independently of any contract which an adverse party may have made with another, not a party to the suit, even though their assertion may affect the ability of the former to fulfill his contract. The rights asserted in the suit and those arising upon the contract are distinct and separate, so that the Court may, in a proper case, proceed to judgment without joining other parties to the contract, shaping its decree in such manner as to preserve the rights of those not before it. General Invest. Co. v. Lake Shore & M. S. R. Co. 260 US 261, 285, 286, 67 L ed 244, 258, 259, 43 S Ct 106; American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co. (DC) 10 F Supp 512, 515, affirmed in (DC) 76 F (2d) 1002; Fidality & D. Co. v. Montana (CCA 9th) 92 F (2d) 693, 698; Brogdex Co. v. Food Machinery Co. (CCA 3d) 92 F (2d) 787, 789; Commercial Casualty Ins. Co. v. Lawhead (CCA 4th) 62 F (2d) 928, 931, 932; cf. Hamilton v. Savannah, F. & W. R. Co. (CC) 49 Fed 412; Howe v. Howe & O. Ball Bear-

ing Co. (CCA 8th) 154 F 820, 828; Alcazar Amusement Co. v. Mudd & C. Amusement Co. 204 Ala 509, 86 So 209; E. L. Husting Co. v. Coca-Cola Co. 194 Wis. 311, 216 NW 833; Nokol Co. v. Becker, 318 Mo 292, 300 SW 1108."

A similar question was involved in *E. L. Husting Co. v. Coca-Cola Co.*, 194 Wis. 311, 316, 216 N. W. 833, where plaintiff and defendants claimed rights under contracts with a non-resident third party (Western Company) not a party to the suit. The defendants maintained that the non-resident third party was an indispensable party to the contract upon which plaintiff predicated its rights and the continued existence of the contract was in issue. The court said:

> "The statute so considered (sub. (1), sec. 260.19, Stats.), provides, in substance, that controversies between parties then before the court may be determined when it can be done without prejudice to the rights of others or by saving their rights; but that 'when a complete determination of the controversy cannot be made without the presence of other parties, or any persons not parties to the action have such interests in the subject matter of the controversy as require them to be made parties for their due protection, the court shall order them to be brought in. . . .'
>
> "We are satisfied, however, that no such all-compelling effect should be given, under the circumstances disclosed in this record, to this statute, and furthermore that the Western Company, although the only party to any contract with the plaintiff, is nevertheless not an *indispensable* party to this action even though relief is asked in the form of money damages against the Western Company and relief by way of restraint upon the other and appearing defendants.

"On the first point we think that a statute such as the one here invoked, even though mandatorily and expressly requiring our courts to make some third person a party to a pending action, carries with it, by implication and by force of necessity, the limitation that it is intended to apply only to such third persons who are so situated as to be within the power of a then party to the action or of the court itself to bring within the court's jurisdiction. Otherwise it would be requiring of parties or courts the peforming of the impossible or the going through with an idle and futile formality.

* * *

"We therefore feel that such statute ought not to be construed, as the ruling below in effect does, to deny a plaintiff in our courts any relief whatsoever against defendants over whom the court has obtained jurisdiction solely because in passing upon the rights of the parties then before it there is necessarily involved a material question concerning the rights or liabilities of a third person who is not and who cannot be brought within the court's jurisdiction."

See also *Gibraltar Productions v. B. K. O. Teleradio Pictures,* (D. C. S. D. N. Y. 1958) 159 F. Supp. 457.

The court concludes that the Fulton County Recreation Authority has no direct legal interest in the subject of this action and is not an indispensable party to the action.

All authorities cited in the briefs presented by both sides have been examined and considered whether or not referred to in this decision.

The court concludes and determines that the complaint herein states facts sufficient to constitute a cause of action, that it is sufficient in law and that the court has jurisdiction.

Accordingly the demurrers are overruled, on all grounds, and the action will proceed to trial on the merits.

Considering that the defendants had previously prepared and filed answers to the complaint (prior to the remand from the Federal Court), which were withdrawn by stipulation to enable them to file the demurrers, it should not be a hardship for them to now answer to the complaint within seven days from the date hereof.

Orders in conformity with this decision will be presented.

Respectfully submitted,

ELMER W. ROLLER
Circuit Judge

Dated January 24th, 1966.

APPENDIX D

OPINION OF CHIEF JUDGE, ROBERT E. TEHAN ON MOTION TO REMAND

(Formal Parts Omitted)

This action, commenced in the Circuit Court of Milwaukee County by the State of Wisconsin against the National League and the ten member teams thereof and arising by reason of the intended move of the Milwaukee Braves to Atlanta, Georgia, was removed to this court on petition of all defendants, except the National League, on August 26, 1965.

The plaintiff has filed a motion to remand. Briefs, with respect to that motion, have been filed and today we heard the arguments—the court heard the arguments, and the court is prepared to render its decision.

In its complaint, the plaintiff alleges a continuing contract, combination or conspiracy in unreasonable restraint of trade on the part of the defendants in violation of § 133.01, Wisconsin Statutes, and of the common law, and asks that the court adjudge and decree that the defendants have so violated the law, imposed a forfeiture and enjoin certain activities on the part of the defendants.

In support of their position that this case was properly removed to this court, the moving defendants argue that there exists three bases for jurisdiction, the existence of a Federal question and of a cause of action arising under the Federal anti-trust laws and diversity of citizenship.

The first two grounds have, to a great extent, been argued together by the defendants.

The defendants contend that the complaint, alleging unreasonable restraints of interstate commerce, necessarily states a Sherman Act claim, and that this action is therefore removable because State courts have no authority to enjoin unreasonable restraints of interstate commerce, such actions being maintainable only in the Federal courts. This argument has a basic flaw. If the defendants are correct that this action states a Sherman Act claim, no matter how the claim is denominated by the plaintiff, and could only be brought in Federal court, as stated at Page 25 of their brief filed October 25, 1965, it necessarily follows that the State court, from which the action was removed, was without jurisdiction and jurisdiction cannot be obtained by this court by removal, although the action could originally have been brought here. That's citing from the Cyclopedia of Federal Procedure, § 3.11. Under such circumstances, the action should be remanded to the State Court. Again a citation of Cyclopedia of Federal Procedure, § 3.140, page 408, *Weeks v. The Fidelity and Casualty Company of New York* (C. A. 5, 1955) 218 F. 2d 503.

Parenthetically, I remark that we recognize the fact that there is a division of authority on whether a remand or dismissal is proper, but believe that the better practice permits the State Court to make its own determination as to its jurisdiction over the subject matter.

In arguing that the plaintiff really should have pleaded the Sherman Act on the facts alleged, and that the court should treat the complaint as so pleading, the defendants

ask the court to amend the complaint without the plaintiff's consent. We do not believe that this court, at the request of the defendants, should redraft the plaintiff's pleading to allege a cause of action which the plaintiff deliberately spurned and had disclaimed any intention of pursuing. Rather, it is our opinion that the plaintiff has a right to rely, for better or for worse, on the cause of action it chose to assert, and to freely subject itself to a possible dismissal if the defendants be correct that the cause of action, as alleged under State law, is without merit.

The defendants also contend that if this action is brought under State law, as claimed by the plaintiff, questions as to the constitutionality of that law are involved and assert that the State law, if interpreted as the plaintiff desires, imposes unconstitutional burdens on interstate commerce and attempts to regulate a field pre-empted by Federal law. We agree, however, with the plaintiff that questions as to the constitutionality of the State statute under which the plaintiff sues, or as to possible Federal pre-emption of the field covered by that statute, are matters which are properly raised as defenses to the complaint. The existence of these defenses challenging State law and based on Federal law or on the Constitution does not confer jurisdiction on this court. Citing *Debevois v. Rutland Railway Corporation* (C. A. 2, 1961) 291 F. 2d 379.

In support of their position that this court has jurisdiction by reason of diversity of citizenship, the defendants assert that the State of Wisconsin, plaintiff, is not the real party in interest and that diversity exists between the real parties in interest, and all defendants.

Parenthetically, I might state that the defendants apparently admit that the State is not a citizen and removal of suits between a State and citizens of another State on grounds of diversity is not permitted.

And, again parenthetically, this argument is complicated by the fact that the plaintiff claims that the principal place of business of defendant, Milwaukee Braves, Inc., is Milwaukee and the defendants claim that the defendants' principal place of business is Atlanta, Georgia.

In its complaint, the plaintiff alleges in part that the league and others have agreed to an illegal plan prohibiting any successor to the Braves from operating a major league baseball team in Milwaukee after the Braves' intended departure and to prevent Milwaukee Brewers Baseball Club, Inc., Milwaukee County, or any other person wishing to organize and operate a major league team in Milwaukee, from participating in the league and intend to refuse to grant the application of Milwaukee County or Milwaukee Brewers Baseball Club, Inc. for membership in the league and to prevent others, who are willing to organize and operate a major league team in Milwaukee, from obtaining players or arranging games with other major league teams. It asks in part that an injunction be issued restraining defendants from refusing to grant the application for league membership submitted by Milwaukee County or the Brewers and requiring them to take steps to facilitate organization of a major league team here, including granting the County, the Brewers, or some other suitable person a franchise to operate a team.

Parenthetically we note: It should be noted that the citizenship of "some other suitable person" who might benefit, if relief be granted, cannot be determined.

The defendants take the position that Milwaukee County and the Brewers, a Wisconsin corporation, and not the State of Wisconsin, are the real parties in interest whose citizenship should be determinative for diversity purposes and have asked for discovery to obtain proof that the plaintiff is a nominal party. The plaintiff admits that Milwaukee County, the Brewers, or someone else, might benefit if it succeeds in this action, but states that it is the real party in interest as a matter of law.

The authority under State law for the State to bring this action cannot be questioned and, after considering carefully the cases relied upon by the defendants in support of their position, we must state that we find nothing in those cases to lead us to the conclusion that the State must be considered a nominal party only, and that Milwaukee County and the Brewers are the real parties in interest.

No case has been cited ruling that a State, in enforcing its antitrust laws, is a nominal party only simply because enforcement may be beneficial to others.

In our opinion, the State is, as a matter of law, the real party in interest herein for purposes of determining diversity jurisdiction. Particularly is this true where the State seeks not only injunctive relief but also a statutory forfeiture.

We can sympathize with the motives which, we surmise, prompted the defendants to attempt to remove this

action. It would unquestionably be more economical and simpler to conduct all related cases in a single forum.

But we add, parenthetically, that three related cases are now pending in this court.

And the wide publicity and public sentiment engendered by reason of the Braves' move to Atlanta may have given rise to a desire that the action be dealt with in what has often been referred to as a neutral forum. These motives, however, cannot confer jurisdiction.

We hold that this court is without jurisdiction in this action, and the plaintiff's motion to remand must be granted.

That is all.

(Which were all the proceedings had as to the above-entitled matter at said time.)

APPENDIX E

JUDGMENT OF TRIAL COURT

(Formal Parts Omitted)

Upon the Findings of Fact, Conclusions of Law, the Memorandum Decision of April 13, 1966, and upon the entire record in this case, IT IS HEREBY ORDERED, DECREED AND ADJUDGED AS FOLLOWS:

1. That the plaintiff recover from each of the defendants as follows:

(a) The Milwaukee Braves, Inc., a Delaware corporation, whose name has been changed to Atlanta Braves, Inc., and whose address is the Atlanta Stadium, Atlanta, Georgia, the sum of FIVE THOUSAND DOLLARS ($5,000.00) plus the sum of ONE HUNDRED DOLLARS ($100.00) costs plus the sum of THREE HUNDRED FIFTY-EIGHT DOLLARS AND THIRTY-FIVE CENTS ($358.35) disbursements for a total of FIVE THOUSAND FOUR HUNDRED FIFTY-EIGHT DOLLARS AND THIRTY-FIVE CENTS ($5,458.35);

(b) The Houston Sports Association, Inc., a Texas corporation, whose post office address is Box 288, Houston, Texas, the sum of FIVE THOUSAND DOLLARS ($5,000.00) plus the sum of THREE HUNDRED FIFTY-EIGHT DOLLARS AND THIRTY-FIVE CENTS ($358.35) disbursements for a total of FIVE THOUSAND THREE HUNDRED FIFTY-EIGHT DOLLARS AND THIRTY-FIVE CENTS ($5,358.35);

(c) The Chicago National League Ball Club, Inc., a Delaware corporation, whose post office address is Wrigley Field, Clark & Addison, Chicago, Illinois, the sum of FIVE THOUSAND DOLLARS ($5,000.00) plus the sum of THREE HUNDRED FIFTY-EIGHT DOLLARS AND THIRTY-FIVE CENTS ($358.35) disbursements for a total of FIVE THOUSAND THREE HUNDRED FIFTY-EIGHT DOLLARS AND THIRTY-FIVE CENTS ($5,358.35);

(d) The Cincinnati Reds, Inc., an Ohio corporation, whose address is 415 Central Trust, Bank Tower, Cincinnati, Ohio, the sum of FIVE THOUSAND DOLLARS ($5,000.00) plus the sum of THREE HUNDRED FIFTY-EIGHT DOLLARS AND THIRTY-FIVE CENTS ($358.35) disbursements for a total of FIVE THOUSAND THREE HUNDRED FIFTY-EIGHT DOLLARS AND THIRTY-FIVE CENTS ($5,358.35);

(e) The Los Angeles Dodgers, Inc., a New York corporation, whose post office address is 1000 Elysian Park Ave., Los Angeles, California, the sum of FIVE THOUSAND DOLLARS ($5,000.00) plus the sum of THREE HUNDRED FIFTY-EIGHT DOLLARS AND THIRTY-FIVE CENTS ($358.35) disbursements for a total of FIVE THOUSAND THREE HUNDRED FIFTY-EIGHT DOLLARS AND THIRTY-FIVE CENTS ($5,358.35);

(f) The Metropolitan Baseball Club, Inc., a New York corporation, whose post office address is 680 Fifth Avenue, New York, N. Y., the sum of FIVE THOUSAND DOLLARS ($5,000.00) plus the sum of THREE HUNDRED FIFTY-EIGHT DOLLARS AND THIRTY-FIVE CENTS ($358.35)

disbursements for a total of FIVE THOUSAND THREE HUNDRED FIFTY-EIGHT DOLLARS AND THIRTY-FIVE CENTS ($5,358.35);

(g) The Philadelphia National League Club, a Pennsylvania corporation, whose post office address is Connie Mack Stadium, 21st & Lehigh, Philadelphia, Pennsylvania, the sum of FIVE THOUSAND DOLLARS ($5,000.00) plus the sum of THREE HUNDRED FIFTY-EIGHT DOLLARS AND THIRTY-FIVE CENTS ($358.35) disbursements for a total of FIVE THOUSAND THREE HUNDRED FIFTY-EIGHT DOLLARS AND THIRTY-FIVE CENTS ($5,358.35);

(h) The Pittsburgh Athletic Company, Inc., a Delaware corporation, whose post office address is P. O. Box 7495, Pittsburgh, Pennsylvania, the sum of FIVE THOUSAND DOLLARS ($5,000.00) plus the sum of THREE HUNDRED FIFTY-EIGHT DOLLARS AND THIRTY-FIVE CENTS ($358.35) disbursements for a total of FIVE THOUSAND THREE HUNDRED FIFTY-EIGHT DOLLARS AND THIRTY-FIVE CENTS ($5,358.35);

(i) The St. Louis National Baseball Club, Inc., a Missouri corporation, whose post office address is 3625 Dodier Street, St. Louis, Missouri, the sum of FIVE THOUSAND DOLLARS ($5,000.00) plus the sum of THREE HUNDRED FIFTY-EIGHT DOLLARS AND THIRTY-FIVE CENTS ($358.35) disbursements for a total of FIVE THOUSAND THREE HUNDRED FIFTY-EIGHT DOLLARS AND THIRTY-FIVE CENTS ($5,358.35);

(j) The National Exhibition Company, a New Jersey corporation, whose post office address is Candlestick Park, San Francisco, California, the sum of FIVE THOUSAND DOLLARS ($5,000.00) plus the sum of THREE HUNDRED FIFTY-EIGHT DOLLARS AND THIRTY-FIVE CENTS ($358.35) disbursements for a total of FIVE THOUSAND THREE HUNDRED FIFTY-EIGHT DOLLARS AND THIRTY-FIVE CENTS ($5,358.35);

(k) The National League of Professional Baseball Clubs, an unincorporated association, having its offices and principal place of business in Cincinnati, Ohio, the sum of ONE HUNDRED DOLLARS ($100.00) costs.

2. The defendants are hereby restrained and enjoined from preventing the organization and operation of a major league professional baseball team with Milwaukee, Wisconsin, as its home by following the injunctive provisions hereinafter directed.

3. The defendant, Milwaukee Braves, Inc., now known as Atlanta Braves, Inc., and all other defendants herein are restrained and enjoined from refusing to grant the application for membership in the National League submitted by Milwaukee County or Milwaukee Brewers Baseball Club, Inc., or by some other suitable person interested in acquiring and operating a National League franchise with Milwaukee, Wisconsin, as the situs of its home games; they and each of them are required to take such actions as may be necessary to facilitate the organization and operation of a major league baseball team with Milwaukee, Wisconsin, as its home commencing with the 1967 baseball

season, including the granting to Milwaukee County, Milwaukee Brewers Baseball Club, Inc., or some other suitable person a franchise to operate a major league professional baseball team and the adoption and execution of an equitable plan for providing a supply of major league professional players for such team.

4. Unless and until the defendants have caused to be granted a major league franchise for the playing of major league professional baseball in Milwaukee, Wisconsin, as provided for in paragraph 3 above, the defendant, Milwaukee Braves, Inc., now known as Atlanta Braves, Inc., and all other defendants herein shall be and they are hereby restrained and enjoined from playing the home championship schedule of the defendant, Milwaukee Braves, Inc., now known as Atlanta Braves, Inc., in any city or place other than the County of Milwaukee, State of Wisconsin, at Milwaukee County Stadium provided:

a. The order contained above in this Paragraph 4 shall be stayed under the continuing jurisdiction of the Court to the 18th day of May, 1966, which stay may thereafter be extended in the event that the defendants shall prior to 12 o'clock noon Central Standard Time on the 16th day of May, 1966, submit to this Court a written plan or plans for expansion of the defendant National League of Professional Baseball Clubs so as to permit Major League baseball to be played at Milwaukee County Stadium with the City of Milwaukee as its "home" effective with the playing season for the year 1967;

b. Such expansion shall contemplate the granting of

a National League franchise to the County of Milwaukee or to such qualified third parties as shall be interested in acquiring a National League franchise and will advise the Court of such fact.

c. The Court reserves jurisdiction in connection with such plan or plans until the same may be consummated with the ultimate parties.

5. The stay provided for in Paragraph 4 hereof will expire at 12 o'clock noon Central Standard Time on May 16, 1966, if no such plan is submitted within said time. Likewise the stay or any extension thereof granted on the strength of any plan submitted will be terminated by the Court in the event the Court concludes that the plan is unsatisfactory.

6. The defendant, Milwaukee Braves, Inc., now known as Atlanta Braves, Inc., will if so required under this judgment to perform its home games in the County of Milwaukee perform them under the supervision of the Court and such board or commission as may be hereinafter appointed by the Court.

BY THE COURT:
/s/ ELMER W. ROLLER
Circuit Judge

Dated May 5, 1966

JUDGMENT OF THE SUPREME COURT OF WISCONSIN

(Formal Parts Omitted)

This cause came on to be heard on appeal from the judgment of the Circuit Court for Milwaukee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court for Milwaukee County be and the same is hereby reversed and the cause remanded with directions to dismiss the complaint.

Justices Heffernan, Hallows and Beilfuss dissent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 659

STATE OF WISCONSIN,
Petitioner,

v.

MILWAUKEE BRAVES, INC., ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 659

STATE OF WISCONSIN,
Petitioner,
v.
MILWAUKEE BRAVES, INC., ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Questions Presented

1. Whether regulation by Wisconsin under its antitrust laws of the structural aspects of the nationwide business of organized baseball would so burden and discriminate against interstate commerce as to violate the Commerce Clause?

2. Whether such state regulation would be in conflict with the national policy manifested by the decisions of this Court in *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953), and *Radovich* v. *National Football League*, 352 U. S. 445 (1957), and by the long and continuing consideration by Congress of the antitrust status of baseball and its continuing acquiescence in baseball's immunity from the federal antitrust laws?

Statement of the Case[1]

Proceedings Below

The case here presented can be briefly stated.[2] After extended consideration,[3] the National League in November 1964 granted the request of the Milwaukee Club (Braves) to transfer its operations to Atlanta effective for the 1966 baseball season. No lease or commitment of any character bound the Braves to Milwaukee beyond 1965. This action was filed in August 1965 in the Circuit Court of Milwaukee County (R. 2). A judgment[4] in favor of the petitioner was entered on May 5, 1966 (App. 275e) which in effect (1) enjoined the Braves from playing their home games

1. References to "R. " are to the certified record. References to "Ex. " are to exhibits in evidence. References to "Pet. " are to the Petition for a Writ of Certiorari. References to "App. " are to the separate Appendix to the Petition..

2. Petitioner devotes most of its Statement of the Case (Pet. 5-15) to arguments that respondents' conduct in moving the Milwaukee franchise to Atlanta was unreasonable under the Wisconsin antitrust laws. The reasonableness of respondents' conduct is not before the Court on this petition, since the Wisconsin Supreme Court did not decide that question (App. 24a). It is therefore unnecessary for us to challenge here the many inaccuracies in petitioner's statement and in the trial court's findings referred to therein. However, the petition so distorts the history of the Braves in Milwaukee that we have summarized that history as established by evidence at the trial (*infra*, pp. 6-8).

3. Ex. 9, 10, 12, 69, 96; R. 2387-8, 6028-32, 6037, 6169-73, 7521-5, 7870-89.

4. The trial court decision includes findings of fact and conclusions of law, all of which (except for the addition of Finding 45 and Conclusions of Law 9-12) were mechanically adopted verbatim from the proposed findings and conclusions of petitioner. Respondents' own proposed findings and conclusions were ignored and respondents were given no opportunity to comment on those submitted by petitioner. The Wisconsin Supreme Court set the trial court findings and conclusions out in part in its opinion (App. 5a-16a) without adopting them.

elsewhere than in Milwaukee after May 18, 1966 (although they had already commenced the 1966 season in Atlanta), unless, before May 16, 1966, the respondents submitted a "satisfactory" plan for a new franchise, (2) provided that the Braves perform their home games in Milwaukee under the supervision of the trial court and a board or commission to be appointed by the court, (3) required respondents to grant a franchise for an eleventh National League club in Milwaukee and to take the steps necessary to facilitate its operation in 1967, including the adoption of an equitable plan for supplying players, and (4) required respondents to pay forfeitures totalling $50,000 and costs.

On July 27, 1966 the Wisconsin Supreme Court reversed the trial court judgment for lack of jurisdiction of the subject matter and dismissed the complaint (App. 281f).

Evidence Relating to Jurisdiction

Critical to the jurisdictional question and to the Commerce Clause and national policy questions upon which it is based is the nearly 100-year old structure of organized baseball. The evidence with respect to this structure is as follows:

The National League and the American League of Professional Baseball Clubs are known as the Major Leagues (R. 5, 6). The National League consists of 10 member clubs in eight states (Ex. 1, pp. 19-21). The American League consists of 10 member clubs in nine states and the District of Columbia (Ex. 1, pp. 5-7). The Major Leagues, their member clubs, the National Association of Professional Baseball Leagues (the association of the minor leagues) and the 19 minor leagues and their members constitute what is generally known as "organized baseball" (R. 5867-8). In 1965 minor league clubs were

located in 26 states and in Mexico and Canada and 13 of the minor leagues operated in more than one state (Ex. 1, pp. 201-73).

"Organized baseball" is organized by a series of agreements and rules which provide for a national administration, the organization and classification of leagues, the distribution, geographical location and number of franchises, handling, selection, assignment and reservation of player contracts, eligibility of players, equalization of competitive playing strengths, uniformity of play, and preservation of the honesty and integrity of the game and public confidence therein. The pertinent agreements and rules are stated in the Official Baseball Blue Book (pp. 501-657) which is Exhibit 1 in this case. Each league has adopted a constitution and rules governing relations among the members of the league (R. 5859). The National League Constitution provides that a vote of three-fourths of the members is required to permit the change of a club's location and unanimous consent is required for an increase in League membership (Ex. 3, Article 3.1).

The 1965 Senate Hart Report[5] said with full cognizance of the Milwaukee situation[6] and the National League Constitution:

> "The present system within organized baseball which requires a vote of the league or leagues before moving a franchise is a means of insuring

5. Senate Judiciary Committee Report on Professional Sports Act of 1965, S. Rep. No. 462, 89th Cong., 1st Sess., 13 (1965), hereinafter referred to as "1965 Senate Hart Report", included in evidence as Ex. 526.

6. Robert P. Russell, corporation counsel for Milwaukee County and a signer of the petition, sought in 1965 to persuade Senator Hart to bring baseball under the antitrust laws without exempting the structural arrangements (Ex. 255, p. 1). His efforts were unavailing and S. 950 was passed by the Senate with the structural exemptions included shortly after this action was commenced. See *infra*, p. 15.

> geographic balance among the teams. But further it has the potential to prevent franchise moves made without a compelling reason. If present antitrust laws were applied with full vigor there would be no means of preventing any team from moving anywhere at any time. Therefore this exemption should have the result of braking rather than accelerating franchise moves."

The Commissioner of Baseball, whose office is created by the Major League Agreement (Ex. 1, p. 501), is the central figure in the organization of baseball. His office and the various league structures exist because of the need to govern and administer organized baseball in a nationally uniform manner, undisturbed by local variations, and the need to guarantee the absolute integrity of every aspect of the operation and play of the game (R. 5870-1). Professional baseball could not exist without such a structure to provide competition between clubs and leagues on a regular basis and to provide a framework for the adoption and enforcement of rules which protect the public and preserve the integrity and uniformity of the game (R. 5890-1, 5919).[7]

These jurisdictional facts constitute and will be referred to throughout this brief as the "structural arrangements" or "aspects" of organized baseball, that is, those essential sports practices which are vital to the operation and survival of organized baseball. It is unnecessary completely to define all such practices, and this statement of facts does not undertake to do so, since those directly

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7. 1965 Senate Hart Report at 14-15; Subcommittee on the Study of Monopoly Power of the House Judiciary Committee Report on Organized Baseball, H.R. Rep. No. 2002, 82nd Cong., 2d Sess., 7, 228-29 (1952), hereinafter referred to as "1952 House Report", included in evidence as Ex. 7.

involved in this case (control of franchise locations and players) are clearly essential.

The need for uniform regulation and the practical impossibility of state regulation were spelled out in the 1952 House Report (p. 7):

> "Pragmatically, organized baseball is not amenable to effective State regulation. As stated above, most baseball leagues include cities in more than one State. These 52 leagues, in turn are combined in an association which embraces 42 States and six foreign countries. Individual games, while conducted wholly within a State, are inseparable elements of the larger pennant race, which is dependent for its success upon interstate activities. Baseballs, bats, player uniforms, and other paraphernalia are purchased through the channels of interstate commerce. Team personnel in traveling from one city to another to complete the playing schedule must use railroads, airplanes, or other means of interstate commerce.
>
> "Equality of competition among clubs within the same league requires equality of the fundamental conditions under which they operate, particularly in the acquisition of players who create baseball contests. For the past 75 years, organized baseball has provided this uniform regulation itself without substantial State or Federal interference.
>
> "After full review of all of the foregoing facts and with due consideration of modern judicial interpretation of the scope of the commerce clause, it is the studied judgment of the Subcommittee on the Study of Monopoly Power that the Congress has jurisdiction to investigate and legislate on the subject of professional baseball."

The History of the Braves in Milwaukee

In the early 1950's, Milwaukee County built a Major League type baseball stadium on the speculation that a

Major League club could be induced to move to Milwaukee from another city (Ex. 164). The County succeeded in attracting the Boston Braves of the National League for the 1953 season (Ex. 164). A five year lease was signed (Ex. 248). Efforts thereafter of the Braves to obtain a longer-term lease on the same terms were unsuccessful and another five year lease was signed for 1958-62 and a three year lease for 1963-65 (Ex. 120, 247; R. 3841). In other National League cities where publicly owned stadia are leased by National League clubs, the lease periods are New York 30 years, Atlanta 25 years, St. Louis 30 years, Houston 40 years, San Francisco 35 years, Philadelphia 30 years (Ex. 246). Attendance at the outset was outstanding and continued to climb through 1957 when the Braves won the pennant. Thereafter, attendance plummeted notwithstanding a pennant winner in 1958, a tie for first in 1959, winning baseball in all seasons, perennial first division finishes (except 1963—6th place) and one of the most exciting teams in baseball (Ex. 176-85, 93-5). During the five years 1961-65, Milwaukee had the worst average attendance in the National League (even omitting the low 1965 attendance from the Braves average) (Ex. 506, p. 32), save only the Chicago Cubs, a club which has not finished in the first division for twenty years and is the only team in the Majors without lights for night baseball (Ex. 245; R. 5975). The attendance situation, combined with (1) operating losses in 1963 and 1964 (Ex. 14-15) and the prospect of continuing losses (Ex. 10), (2) inadequacy of the television market (confined by Lake Michigan to the east, Chicago to the south and the territory of the Minnesota Twins to the north and west—the latter commencing in 1961) (Ex. 510, p. 6), (3) a hostile county government (e.g., public challenges by the chairman of the county board concern-

ing the integrity of the Braves' players, manager and owners (Ex. 90, 404; R. 6440-1)), and (4) other serious operating impediments such as a fiercely hostile press (Ex. 10; R. 4383-410), left the Braves with no alternative but to seek a new playing location. Moreover, the National League, in granting permission, considered the fact that the Wisconsin area had plentiful access to Major League baseball through the Chicago Cubs, Chicago White Sox and Minnesota Twins (Ex. 10). The decision to transfer did not occur until after the Braves had made unprecedented efforts to improve the situation in Milwaukee (Ex. 111; R. 6035-6, 6883-910), a private offering to community leaders of a substantial ownership interest in the Braves had utterly failed (R. 6845-62) and a public offering to Wisconsin residents of 36% of the Braves outstanding common stock (at the price paid by the Braves) had resulted in sales of 4% (Ex. 13; R. 6863-74). At no time did anyone in Wisconsin make a money offer to purchase the club from the respondent Braves (R. 6935-6). Prior to the decision of the National League to transfer the Braves to Atlanta, the County of Milwaukee and leading Milwaukee citizens were endeavoring to attract the Cleveland Indians and Kansas City Athletics of the American League to move to Milwaukee (Ex. 150-1, 441, 490; R. 3827-9). The trial court condemned such conduct (App. 92b) but nevertheless found the Milwaukee Brewers Baseball Club, Inc., a corporation formed in July 1965 (Ex. 29), of which several of the same citizens were founders and stockholders (App. 92b; Ex. 443; R. 7644-5), qualified to receive the expansion franchise the court ordered the respondents to grant (App. 278e).

ARGUMENT

The petition presents no federal question of substance and seeks an application of the Wisconsin antitrust laws in conflict with the Commerce Clause and national policy. The decision of the Wisconsin Supreme Court is in accord with applicable decisions of this Court.

The Wisconsin Supreme Court correctly held that the State's antitrust law cannot be applied to regulate "the very fabric" of the interstate business of baseball (in this case the number and location of clubs and allotment of players), because to do so would conflict with national policy and, in violation of the Commerce Clause, would regulate aspects of the interstate business which require uniformity of regulation (App. 21a, 37a-39a).

That the business of organized baseball is interstate commerce is recognized by the decisions of this Court in *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953) and *Radovich* v. *National Football League*, 352 U. S. 445 (1957),[8] by Congress[9] and by the majority and dissenting opinions of the court below (App. 24a, 43a). The business is unique in that the clubs in each league must act as partners as well as competitors and must adopt and operate under a system of structural rules and regulations which would be entirely inappropriate in an ordinary industry and as to which the application of conventional antitrust principles would be both inappropriate and destructive of the public interest in the game. See 1965 Senate Hart Report at 12; 1952 House Report at 229. These structural

8. The history of baseball's immunity from the federal antitrust laws, commencing with *Federal Baseball Club of Baltimore* v. *National League*, 259 U. S. 200 (1922), and the pertinent language of the cases are fully set forth in the majority opinion below (App. 27a-31a) and need not be repeated here.

9. See 1965 Senate Hart Report at 4-6; 1952 House Report at 4-7.

arrangements are essential to the national commerce of baseball which requires by its very nature a national uniformity of regulation by a single regulating authority. See *California* v. *Zook*, 336 U. S. 725, 728 (1949); *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 767-68 (1945).

Whether or not the long recognized distribution of power between the national and state governments, as to subjects requiring national uniformity and those admitting of local regulation, is predicated upon (1) the "implications of the Commerce Clause itself" or (2) upon the "presumed intention of Congress where Congress has not spoken" (by enacting legislation),[10] the result in this case is the same.[11]

As to the implications of the Commerce Clause, the burden which would be imposed by Wisconsin on the baseball commerce by disrupting its national uniformity of regulation is clear and is not directly, if at all, disputed by the petition or by the dissenting opinion below (App. 49a).

As to the presumed intention of Congress and the national policy which it manifests, these are evidenced by the very extensive Congressional activity (Congressional hearings, reports, acts and bills) with respect to baseball and league sports over the past 15 years[12] and the decisions of this Court in *Toolson* and *Radovich* holding that the business of baseball is not subject to the federal antitrust laws unless and until Congress determines otherwise.[13] This Court has recognized that the applica-

10. *Southern Pacific Co.* v. *Arizona, supra* at 768.

11. The Wisconsin Supreme Court recognized both bases for its decision (App. 37a-38a) as had this Court in *Southern Pacific, supra* at 767-68 and *Zook, supra* at 728, both Commerce Clause cases.

12. See 1965 Senate Hart Report at 6-11.

13. The policy of the sovereign may be expressed by its judiciary as well as by its legislature. *Hughes* v. *Superior Court of California*, 339 U. S. 460, 466 (1950).

tion of the federal antitrust laws to baseball by judicial decision would have devastating effects on the baseball business and has declared that in *Toolson* it continued to hold the umbrella over baseball because it foresaw such harm through a flood of litigation and harassment. *Radovich* v. *National Football League*, 352 U. S. 445, 450-52 (1957). It is just as clear that judicial application to baseball of state antitrust laws (which have never been so applied) would have an even more devastating effect and would destroy the baseball business which the *Toolson* umbrella is designed to protect.

From these decisions and the resulting Congressional consideration of baseball, a national policy emerges clearly with which Wisconsin's attempted regulation is in direct conflict: the unique self-regulatory system of baseball (which is broadly assaulted by Wisconsin in this case) should be free of antitrust regulation, state or federal, until such time as Congress elects to modify baseball's immunity. Though assured by this Court in *Radovich* of its Constitutional power to modify or eliminate this immunity (352 U. S. at 452), Congress has not seen fit to do so, notwithstanding careful study of the baseball industry and its demonstrated readiness to enact legislation regarding league sports when deemed in the public interest. See pp. 15-16, *infra*.

We do not contend that the business of baseball is totally free from the application of state antitrust laws. We make no claim, for instance, that state antitrust laws could not apply to an agreement among competing food, concession or novelty sellers, including a baseball club seller, to maintain prices. We do contend, however, that organized baseball's fundamental structural arrangements are outside the scope of state antitrust laws, as well as the federal antitrust laws.

There has been no misinterpretation of *Toolson* which requires review. Like *Toolson* and in complete accord with it, the decision below is strictly limited to baseball and leaves to Congress the determination of baseball's antitrust status.

Petitioner's Argument

The contentions of the petition are:

1. The Commerce Clause cannot bar regulation of baseball because of a mere possibility of conflict with other states (Pet. 33-37).

2. The decision below is a formidable obstacle to state antitrust enforcement generally (Pet. 17-18).

3. An "exemption" from the federal antitrust laws cannot carry with it a "preemption" of state antitrust laws (Pet. 19-25).

4. There is a national policy that states may apply their antitrust laws to baseball (Pet. 25-32).

We deal with these arguments in turn.

1. The Commerce Clause and national policy bar state regulation of the structural aspects of organized baseball.

Petitioner's Commerce Clause argument is concerned solely with the possibility of conflict with other states and ignores the express bases for the decision below. As held below, the Commerce Clause and national policy arguments require consideration of the (1) intent of Congress respecting baseball, (2) the decisions of this Court respecting baseball from which the Congressional consideration of baseball springs and (3) the nature of the burden on baseball commerce sought to be imposed by Wisconsin.

Southern Pacific Co. v. *Arizona,* 325 U. S. 761 (1945), presents a striking parallel to the present case because the subject matter required national uniformity of regulation and because of Congress' consideration of the subject matter and continuing statutory silence. This Court held the Arizona Train Limit Law unconstitutional, recognizing that the length of interstate trains must be regulated, if at all, on a uniform basis from state to state and that no one state—only Congress—could prescribe this regulation. Congress, as this Court noted (325 U. S. at 766), had refused to prescribe train lengths. This Court held (325 U. S. at 767-68, 779-80):

> "But ever since *Gibbons* v. *Ogden,* • • • the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority • • •. Whether or not this long recognized distribution of power between the national and the state governments is predicated upon the implications of the commerce clause itself • • • or upon the presumed intention of Congress, where Congress has not spoken, • • • the result is the same.
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> • • • • • •
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> "The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by 'simply invoking the convenient apologetics of the police power,' • • •." (Citations omitted.)

The requirement of national uniformity may very well result in subjects which are free of all regulation (federal or state), as were train lengths in *Southern Pacific,* at

least until Congress asserts its regulatory power.[14] There is a long line of authority in this Court for the proposition that states may not regulate subjects of interstate commerce requiring national uniformity of regulation.[15] Of course, Congress may determine that such commerce should be subject to local regulation and so declare. *E.g.*, *In re Rahrer*, 140 U. S. 545, 549 (1891).

As to required national uniformity of regulation, *Southern Pacific* directs us to "the implications of the Commerce Clause" and to "the presumed intention of Congress where Congress has not spoken."[16] Congressional consideration of baseball has been intense following the express referral of the baseball antitrust status to Congress in the *Toolson* and *Radovich* cases.

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14. See also *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 479 (1939); *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298, 310 (1924); *Minnesota Rate Cases*, 230 U. S. 352, 396-97 (1913); Ribble, *State and National Power Over Commerce*, p. 212 (Columbia University Press 1937).

15. *Morgan* v. *Virginia*, 328 U. S. 373, 377-78 (1946) (bus segregation); *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 767 (1945) (train lengths); *Edwards* v. *California*, 314 U. S. 160, 172, 176 (1941) (indigents); *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298, 308 (1924) (natural gas); *Leisy* v. *Hardin*, 135 U. S. 100, 108-110 (1890) (alcoholic beverages); *Hall* v. *DeCuir*, 95 U. S. 485, 489 (1877) (riverboat segregation); *Welton* v. *Missouri*, 91 U. S. 275, 280 (1875) (licensing of peddlers selling interstate products); *Cooley* v. *The Board of Wardens*, 53 U. S. (12 How.) 299, 319 (1851) (recognized principle).

16. 325 U. S. at 768. As to the importance of Congressional intent and silence in Commerce Clause cases, see opinion below (App. 37a); *Head* v. *New Mexico Board*, 374 U. S. 424, 430 (1963); *California* v. *Zook*, 336 U. S. 725, 728, 731 (1949); *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. 507, 521 (1947); *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 421-33 (1946); Bikle, *The Silence of Congress*, 41 Harv. L. Rev. 200 (1927) ("The silence of Congress in respect to a matter of national concern is interpreted by the Court as evidence of its will that the matter shall not be regulated by the states" (p. 220-21)).

Legislative Consideration of Baseball

For the last 15 years Congress has had organized baseball under almost constant scrutiny. In 1951 extensive hearings covering many weeks were held by the Subcommittee on the Study of Monopoly Power of the House Judiciary Committee. The 1952 House Report rejected state regulation of baseball in language quoted above at page 6 and further recognized the unique nature of the baseball industry,[17] as did the court below (App. 21a-22a).

In response to this Court's 1957 statement in *Radovich* that "the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by court decision" (352 U. S. at 452) legislation has been considered regarding the antitrust status of baseball in every subsequent Congress.

This legislative history was reviewed in detail in the 1965 Senate Hart Report (pp. 6-11). It was there noted (p. 9) that the House in 1958 passed H.R. 10378,[18] exempting from the antitrust laws certain specific aspects of the organized team sports of baseball, football, hockey and basketball, including player control regulations and the right to operate within specified geographic areas. The companion bill in the Senate was tabled on August 1, 1958. On August 31, 1965 the Senate passed S. 950,[19] the Professional Sports Act of 1965, the exemption provisions of which are nearly identical with those of H.R. 10378. This bill was not considered in the House prior to adjournment of the 89th Congress in October 1966.

17. 1952 House Report at 229.

18. H.R. 10378, 85th Cong. 2d Sess. (1958).

19. S. 950, 89th Cong., 1st Sess. (1965), included in evidence as Ex. 525.

In the 1961 Sports Television Act,[20] Congress granted the four organized professional team sports an explicit exemption from the antitrust laws in respect to certain television contracts and specifically provided that the statute should not be deemed to change the applicability or nonapplicability of the antitrust laws to any activity by persons engaged in these team sports, except the television agreements to which the statute applied, thus clearly preserving baseball's status under *Toolson*. Congressman McCullough, in explaining the bill before the House (107 Cong. Rec. 20,062, Sept. 18, 1961), stated that the Act would not affect the different treatment of baseball and football under the antitrust laws.

In October 1966, Congress enacted an amendment to the 1961 Sports Television Act by exempting the June 1966 merger agreement between the National Football League and the American Football League from the federal antitrust laws.[21] The amendment further prohibits certain professional football telecasts which would conflict with the playing of high school football games. This current legislation demonstrates Congress' readiness to deal with particular sports situations which it feels require legislation.

The Burden on Commerce

The complaint in this case attacks not merely the removal of the Braves' franchise to Atlanta, but the entire structure of organized baseball, player control arrangements and its disciplinary practices (R. 8-12).[22] The

20. 75 Stat. 732 (1961), 15 U.S.C. §§1291-95.

21. H. R. 17607 (§6), 89th Cong., 2d Sess. (1966).

22. Counsel for petitioner have been frank to admit that ultimate relief, in the event they prevail, may require restructuring of baseball, modification of its rules or, in the event such structural changes are unsuccessful, baseball's destruction (R. 819, 1192). The petition attacks the reservation of players (Pet. 9, and n. 6).

conclusions of law of the trial court fully accepted the petitioner's sweeping contentions (App. 198b-199b).

The judgment of the trial court goes, in the language of the Wisconsin Supreme Court, to "the very fabric of the organization of commercial baseball" (App. 21a), dealing as it does with the Braves' return from Atlanta and expansion of the National League to 11 clubs.

As to the return of the Braves from Atlanta, the petition (p. 13 n. 15) concedes that the Wisconsin Supreme Court held the trial court's judgment in this regard erroneous under state law (App. 25a). Since to this extent the Wisconsin Supreme Court decision is based upon an independent and adequate state ground, the return of the Braves is no longer an issue in this case.

The requirement of expansion unreasonably burdens and discriminates against commerce for the following reasons:

1. It would discriminate against the interstate baseball commerce for the benefit of local Milwaukee businesses[23] (such as hotels, motels, restaurants, food suppliers and the local businessmen who control the Milwaukee Brewers, the expansion applicant approved by the trial court) which allegedly have been injured by the loss of major league baseball (Pet. 11; Ex. 240, pp. 79-82; R. 13). The court below recognized the purpose of petitioner in this action is "preserving business activity within its borders" (App. 26a). This effort to benefit local business at the expense of interstate commerce is prohibited discrimination against that commerce within the meaning of the leading

23. Since expansion would require the defendants to transfer valuable player contracts and other property rights to a private business in Milwaukee, it would constitute an unconstitutional taking of private property rights. *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S. 239, 251 (1905); *Missouri Pacific Ry.* v. *Nebraska*, 164 U. S. 403, 417 (1896).

authorities. *Hood & Sons* v. *DuMond*, 336 U. S. 525, 538-39 (1949); *Toomer* v. *Witsell*, 334 U. S. 385, 403-04 (1948); *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 522-23 (1935); *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 13 (1928); *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 597 (1923); *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 254-55 (1911).[24] The use of police power is upheld if the subject matter is one which may be appropriately regulated in the interest of the health, safety, welfare and morals of the citizens of the state (*Mugler* v. *Kansas*, 123 U. S. 623, 661 (1887)) and is one "which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress." *Parker* v. *Brown*, 317 U. S. 341, 362-63 (1943). Obviously, these standards are not met in this case. Attenuated theories of benefit to the public interest through economic well-being as justifying exercise of police power have been rejected by this Court. *Head* v. *New Mexico Board*, 374 U. S. 424, 428, n. 4 (1963);

24. Petitioner relies on *Huron Portland Cement Co.* v. *City of Detroit*, 362 U. S. 440 (1960) and *Head* v. *New Mexico Board*, 374 U. S. 424 (1963) for the proposition that state regulation of interstate commerce is permissible in the absence of discrimination or disruption of required uniformity (Pet. 34). Both discrimination and disruption *are* involved in the instant case. Moreover, in *Huron* there was a federal statute which expressly authorized the state to regulate the commerce involved. *Huron* held a Detroit smoke abatement ordinance valid as applied to passing ships in light of a federal statute (69 Stat. 322 (1955), 42 U. S. C. §1857) authorizing the states to act with respect to air pollution and declaring that subject to be a matter of state and local concern. In *Head* this Court upheld a New Mexico law prohibiting newspaper and radio advertising by optometrists, an obvious matter of local concern traditionally within the police power of the state to protect the public health. Moreover, the expressed policy of the Federal Communications Commission was that radio advertising contrary to state law on subjects relative to health, safety and morals, is not to be treated by the Commission as being in the public interest. 374 U. S. at 432, n. 11.

Baldwin v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 522-23 (1935).

2. It would require the other ten National League clubs to change their present interstate operations and to travel regularly to Milwaukee to play the Brewers.[25]

3. It would require the other ten National League clubs, at the very least, to transfer existing valuable player contracts to the Brewers, thereby depriving the interstate commerce operating in the present eight National League states of those property rights, having a value in excess of six million dollars (R. 7223-7).[26]

4. It would, in the language of the court below, "directly affect defendants' operations outside the state" (App. 25a) and subject the other ten clubs to irreparable injury by forcing them to operate as an 11-club league which is shown by the evidence to be neither feasible nor practical.[27] Alternately, it might force expansion to 12 teams in each Major League which petitioner's witness Veeck testified would be necessary (R. 4644). This would multiply the burden of supplying players for a one club expansion four times and would injure the baseball business by seriously diluting the player supply (R. 7530, 7982).

5. It would disrupt the present self-regulatory system of baseball as it relates to player control and franchise location and substitute the judgment and continuing supervision of the trial court (App. 279-280e).

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25. See majority opinion below (App. 25a).

26. See majority opinion below (App. 25a).

27. Every baseball expert who testified at trial rejected an 11-club league as unfeasible as an operating matter, including petitioner's expert Bill Veeck (R. 4644, 6144-5, 6356-7, 7536). Petitioner's effort to imply to the contrary (Pet. 8) is inaccurate.

6. It would conflict with a clear national policy that baseball should be permitted to regulate itself until such time as Congress may determine otherwise.

Obviously, the League could not operate under the kind of regulation imposed by the judgment, particularly where the subject matter would make local objectivity doubtful (App. 39a).

Possibility of Conflict

Petitioner argues that the Commerce Clause cannot bar the attempted regulation of baseball because of the mere possibility of conflict with other states (Pet. 33-37). The court below did not limit its holding to this point and petitioner's cases (Pet. 36) do not support the argument, since they simply do not involve a possibility of conflict threatening a subject matter requiring uniform national regulation.[28] Additionally, petitioner's argument is refuted by the following legal principles:

1. It is not necessary to prove conflict or likelihood of conflict in order to establish that state regulation is a burden on commerce. This is demonstrated by the dis-

28. *Head* v. *New Mexico Board*, 374 U. S. 424, 429 (1963) ("The appellants have pointed to no regulations of other States imposing conflicting duties, nor can we readily imagine any."); *Colorado Anti-Discrimination Commission* v. *Continental Airlines, Inc.*, 372 U. S. 714, 721 (1963) (Colorado anti-discrimination statute applied to the hiring of airline pilots; conflict impossible because any state statute requiring discrimination would be void under Fourteenth Amendment); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U. S. 440, 448 (1960) (smoke abatement ordinance upheld; conflict impossible because ship need only conform to state pollution law with highest standards); *Bibb* v. *Navajo Freight Lines*, 359 U. S. 520, 529 (1959) (involved an actual conflict); *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. 507, 521-23 (1947) (the probability of conflict was held not strong enough to outweigh a long history of state regulation expressly permitted by the Natural Gas Act).

crimination cases which do not involve conflicts at all. See discrimination cases, *supra* p. 18.

2. The mere logical possibility of conflict or dual regulation is a significant factor weighed by this Court in invalidating state regulation where interstate commerce requiring uniform regulation is involved. *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 773-75 (1945); *Edwards* v. *California*, 314 U. S. 160, 176 (1941); *South Covington Ry.* v. *Covington*, 235 U. S. 537, 547-48 (1915); *Hall* v. *DeCuir*, 95 U. S. 485, 489 (1877); see also *United Air Lines, Inc.* v. *Illinois Commerce Commission*, 32 Ill. 2d 516, 207 N.E. 2d 433, 438 (1965).

3. There is a strong probability of conflicting or dual regulation of baseball by other states than Wisconsin if this litigation is successful. The general popularity of professional baseball makes such a result almost inevitable. The competition for teams involving Atlanta, Milwaukee, Boston, Cleveland and Kansas City (Ex. 150-1, 441, 490; R. 3827-9) is evidence enough of this popularity as is the very pendency of this litigation. Further evidence is the interest of other cities in new Major League franchises, as shown by petitioner's evidence at trial (Ex. 24; R. 3239). The likelihood of conflicts is ably analyzed by the Wisconsin Supreme Court (App. 38a-39a) which recognized that "it may be doubted that a state will be objective" in dealing with the distribution of available franchises throughout the country.

2. The decision below will not frustrate state antitrust enforcement against other industries engaged in interstate commerce.

The petition seeks to enlarge the implications of the decision below to make it appear that the decision will have crippling effects on state antitrust enforcement

generally. It talks of "far reaching and disturbing implications" of the decision and calls it a "formidable obstacle" to state antitrust enforcement (Pet. 17). The risks are illusory.

The Wisconsin decision is confined to "a particular industry", baseball (App. 36a), with a unique antitrust status (App. 24a, 31a). As emphasized by this Court in *Radovich*,[29] the federal antitrust immunity recognized in *Toolson* is carefully restricted to baseball and no other business has such an adjudication. In view of the clear limitation of the decision below and of *Toolson* to baseball, petitioner's argument that the Wisconsin decision would frustrate state antitrust enforcement generally is completely unfounded.

The Wisconsin Supreme Court has not been hesitant in the past in applying Wisconsin's antitrust laws to interstate businesses, including the interstate chemical industry[30] and the interstate petroleum industry,[31] notwithstanding claims that such application unduly burdened interstate commerce and conflicted with the federal antitrust laws.

The decision below guarantees continued viability of state antitrust laws generally, saying:

> "The state may, ordinarily, protect the interests of its people by enforcing its antitrust act against persons doing business in interstate commerce, but then, ordinarily, the federal government has an antitrust policy like that of the state." (App. 26a.)

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29. 352 U. S. 445, 450-52.

30. *State* v. *Allied Chemical & Dye Corp.*, 9 Wis. 2d 290, 101 N.W. 2d 133 (1960).

31. *State* v. *Texaco, Inc.*, 14 Wis. 2d 625, 111 N.W. 2d 918 (1961).

3. The case does not involve preemption.

Asserting that the decision below was based on "preemption", petitioner makes much of what it calls "an extraordinary concept of preemption" of state power by a "judicial exemption" from the federal antitrust laws (Pet. 19-25). In fact, the decision never mentions "preemption," a doctrine limited to situations where a pervasive Congressional statutory scheme of regulation precludes local regulation of the same subject. *E.g., Pennsylvania* v. *Nelson;* 350 U. S. 497 (1956) (Smith Act).

Petitioner also asserts an inconsistency between baseball's immunity from state antitrust regulation and court decisions which the plaintiff contends hold that federal statutes exempting certain activities of labor organizations from the federal antitrust laws do not exempt those activities from state antitrust laws (Pet. 19-23). Those decisions do not support the proposition for which they are cited.[32] Moreover, there is an obvious distinction between

32. *Carpenters Union* v. *Ritter's Cafe,* 315 U. S. 722 (1942) and *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490 (1949) both concerned a purely local "stranger picketing" question where the complaining party had no labor dispute with the union. As this Court said in *Giboney,* the unions were challenging the "traditional powers of the states over their domestic economy." 336 U. S. at 497. No question of inconsistency with federal policy or undue burden on commerce was even raised by the defendant unions which argued only that their right to free speech had been abridged. The federal policy which was at issue and which this Court examined in *Hanna Mining Co.* v. *Marine Engineers;* 382 U. S. 181, 189-91 (1965), affirmatively supported the coverage of supervisory employees by state law since they had been expressly removed from the preemptive shelter of the federal law by Congress. In *Commonwealth* v. *McHugh,* 326 Mass. 249, 93 N.E. 2d 751 (1950), *cert. denied,* 340 U. S. 911 (1951), the labor organization's price fixing efforts were successfully prosecuted under both Massachusetts and federal law (*McHugh* v. *United States,* 230 F. 2d 252 (1st Cir. 1956)); and in *Mayer Bros. Poultry Farms* v. *Meltzer,* 274 App. Div. 169, 80 N.Y.S. 2d 874, *appeal denied,* 274 App. Div. 877, 83 N.Y.S. 2d 228 (1st Dept. 1948), the New York court found that no labor dispute was involved.

the subject matters of baseball and labor. The states have traditionally regulated certain local activities of labor organizations under their police power and have zealously and successfully sought to preserve their power in this area. Prior to this case, no state had ever regulated organized baseball's activities under state antitrust laws during its century-long history.[33]

Petitioner further states (1) that the federal antitrust law does not preempt state law but operates concurrently with it (Pet. 19-20) and (2) that national policy through operation of the Commerce Clause cannot preempt state antitrust laws (Pet. 24-25). Of course, concurrent federal-state jurisdiction is permissible, provided that the state regulation is consistent with national policy—not in opposition to it[34]—and the subject regulated by the state is not one requiring uniform national regulation under the Commerce Clause, the imperatives of which cannot be frustrated by misapplied notions of preemption.

Moreover, all of the concurrent jurisdiction cases cited by the petitioner (Pet. 19) involved businesses being carried on within the regulating state. No case is cited in which state power to regulate a business conducted wholly outside its borders is upheld or even claimed. But here, where only one of the ten National League clubs was ever a Wisconsin resident and all of the respondents have discontinued their activities in Wisconsin, they would be

33. *Cf. United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533, 548-49 (1944) (long history of state insurance regulation recognized as strong reason for upholding such regulation in the absence of conflict with Congressional action).

34. *Sears, Roebuck & Co.* v. *Stiffel Company*, 376 U. S. 225, 231 (1964). (Illinois unfair competition law clashes with federal objectives when applied to articles unpatentable under federal patent laws).

compelled by the judgment of the trial court to come back and resume their activities and submit to continued regulation under the antitrust law of that state. This is unprecedented.

4. Petitioner's contention that national policy permits the application of state antitrust laws to organized baseball is erroneous.

Petitioner argues that if there is a national policy pertaining to baseball, it permits the application of state antitrust laws to baseball (Pet. 25-30). This argument is based on the outmoded concept that the organized baseball business is a local affair.[35] Petitioner relies principally on *American League Baseball Club* v. *Chase*, 86 Misc. 441, 149 N. Y. Supp. 6 (Sup. Ct., Erie County 1914), and cites it for the proposition that baseball is subject to state antitrust law.

But *Chase* did not hold that baseball was subject to the New York antitrust law and did not mention that law. In a later New York case, *American League Baseball Club* v. *Pasquel*, 187 Misc. 230, 234, 63 N.Y.S. 2d 537, 540 (Sup. Ct., N. Y. County 1946), cited in the petition (p. 28),[36] the court noted that what was held in *Chase* was that the player contract there involved was not enforceable for lack of mutuality as a matter of contract law and that what *Chase* said regarding monopoly was only dictum.

35. Petitioner bottomed its argument below on the claim that baseball is local and intrastate in character and is not a part of interstate commerce. This discredited claim continues to underlie substantial portions of the petition (Pet. 16, 25-30).

36. Petitioner incorrectly states that the injunctive relief sought in *Pasquel* was denied (Pet. 28, n. 31). A temporary injunction against tampering with players under contract was issued.

That *Pasquel* opinion and the subsequent *Pasquel* opinion (188 Misc. 102, 66 N.Y.S. 2d 743), also cited in the petition (Pet. 28), plainly declared the New York antitrust law inapplicable to baseball.

Contrary to petitioner's statement (Pet. 28) that the 1952 House Report recognized *Chase* as a precedent for state antitrust regulation of organized baseball, the report cited *Chase* only in its discussion of contract enforcement which it distinguished from the antitrust question[37] and said with respect to the latter that "organized baseball is not amenable to effective state regulation."[38]

Petitioner also asserts that baseball has not relied upon immunity from state antitrust law and therefore should not have the benefit of such an immunity (Pet. 30-32). Whether or not baseball has relied on such an immunity is beside the point, where, as here, the attempted regulation violates the Commerce Clause and national policy. The immunity confirmed in *Toolson* would become meaningless if the baseball structural arrangements were made subject to varying state antitrust laws with their "differing standards for decision" as recognized by the court below (App. 39a). Moreover, no state in the nearly 100-year history of professional baseball in the United States has ever sought to regulate those aspects until now, including Wisconsin, where for most of the past century organized baseball (both major and minor) with its characteristic structural arrangements has operated without state antitrust regulation of its affairs.

37. 1952 House Report at 127, 129.

38. *id.* at 7.

Conclusion

The petition for a writ of *certiorari* should be denied.

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In The

SUPREME COURT of the UNITED STATES

October Term, 1966

No. 659

STATE OF WISCONSIN,

Petitioner,

v.

MILWAUKEE BRAVES, INC., ET AL.,

Respondents.

REPLY BRIEF FOR PETITIONER

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In The

SUPREME COURT of the UNITED STATES

October Term, 1966

No. 659

STATE OF WISCONSIN,

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v.

MILWAUKEE BRAVES, INC., ET AL.,

Respondents.

REPLY BRIEF FOR PETITIONER

The court below has held that the Supremacy and Commerce Clauses of the United States Constitution render a state powerless to prevent or redress organized baseball's violation of its antitrust laws. Respondents do not here dispute that under "conventional antitrust principles" (Opposition 9)[1] they have violated Wisconsin's antitrust laws. Instead, they assert, as the court below held, that the State cannot entertain any complaint, render any judgment, or provide any remedy which would prevent or cure the violation.

The important constitutional questions raised by the decision below come to this Court unencumbered by dis-

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[1]Hereinafter cited as "Opp."

pute about the material facts. Respondents' Opposition does not dispute that the applicants for an expansion franchise in Milwaukee (the Brewers and the County) are qualified; or that, because organized baseball has a monopoly of the baseball business, those applicants cannot enter it unless they are awarded a franchise by the National or American Leagues. And, while respondents continue to complain about expansion, and assert that the Braves were justified in moving to Atlanta (Opp. 7-8, 19), the Trial Court found, on a full record, that expansion is in fact feasible and that Milwaukee can support a major league team. The attendance history of the Braves in Milwaukee and final standing is compared with that of all other major league teams in a table printed in an Appendix hereto.

Furthermore, respondents have failed to show either that the decision below is correct or that the questions presented do not warrant review.

1. *No Pre-emption by Congressional Inaction.* The Opposition does not even mention the Supremacy Clause, and respondents now attempt to disown the Supremacy Clause holding of the Wisconsin Supreme Court. They concede that federal pre-emption of state law operates only in "situations where a pervasive Congressional statutory scheme of regulation precludes local regulation of the same subject." They attempt to avoid the Supremacy Clause ground of the decision below by a semantic argument that this "case does not involve preemption." (Opp. 23). But the Wisconsin Supreme Court's invocation of the Supremacy Clause—the very foundation of the pre-emption doctrine—necessarily invoked pre-emption. Even if respondents no longer support the Supremacy Clause theory of the court

below, it remains in the stream of precedent and requires consideration and reversal by this Court.

Furthermore, while respondents now found their "national policy" argument on the Commerce Clause, Congressional policy, under both the Supremacy and Commerce Clauses, is manifested only through relevant acts of Congress, and there is no statute here displacing state law. (Petition 23-5; hereinafter "Pet.").[2]

2. *No Congressional Intent to Displace State Law.* Essentially, respondents' "national policy" argument boils down to two admitted facts plus an unwarranted inference from those facts. The two facts are that under the holdings of this Court baseball is not covered by federal antitrust laws and that Congress thereafter considered the question, but failed either to approve or disapprove that judicial exclusion from coverage. Those facts we do not dispute.[3] But they do not support the inference that, by its subsequent silence, Congress intended baseball to be exempt from state antitrust law.[4] If Congress' inaction means anything here, it is far more likely to mean that

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[2]For a recent discussion demonstrating that Congressional silence has no significance under the Commerce Clause, see I Pollak, "The Constitution and the Supreme Court," pp. 265-74.

Even where there is an act of Congress, Congressional silence is rarely a relevant aid in construing it. See, e.g., **F. T. C. v. Dean Foods Co.**, 384 U. S. 597 (1966).

[3]However, see Pet. fn. 17.

[4]When Congress intends an exemption from federal law to operate as an exemption from state law as well, it knows how to say so. See 49 U. S. C. 5 (11) relating to I. C. C. approved mergers and other transactions and providing that "any carriers . . . participating in a transaction approved . . . shall be and they are relieved from the operation of the [federal] antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal . . . ."

it has adopted the uniformly held view that baseball is subject to state antitrust laws. (Pet. 25-32).

Respondents are notably silent about their prior representations to this Court that state law applied. (See Pet. 26-7, 29). However, they press three other contentions about Congress' intent. All three are vulnerable to short answer.

First, respondents point out that this Court in *Toolson*, 346 U. S. 356 (1953), refused to overrule *Federal Baseball*, 259 U. S. 200 (1922), because of the adverse effects which it was feared retroactive application of the federal antitrust laws might have upon organized baseball. They argue that application of state law would have similar effects upon the business, and that, therefore, state law is also barred. (Opp. 10-11, 26). However, baseball does not enjoy its preferred position under federal law because there is any national interest in preserving its "structure," but solely because *Toolson* determined that baseball's reliance on *Federal Baseball* should be preserved as a matter of *stare decisis*. The rationale of *Federal Baseball*, as preserved by *Toolson*, was that Congress did not deem such local events as professional baseball games to be of sufficient national importance to be covered by the Sherman Act.[5] Further-

[5]Respondents also attempt to misrepresent petitioner's position as "bottomed . . . on the claim that baseball is local and intrastate in character and is not a part of interstate commerce." (Opp. fn. 35). Petitioner, of course, agrees that baseball is interstate commerce within the meaning of the Commerce Clause. The Court in **Federal Baseball** and **Toolson** held, however, that it was not interstate commerce within the meaning of the Sherman Act, and this, of course, is highly relevant in assessing whether Congress, if it is deemed to have approved these decisions, could have intended to displace state law.

more, respondents, having previously represented to this Court that state law would continue to apply (Pet. 26-7), do not and could not claim (see Opp. 26) that they have relied upon an exemption from state law. Under these circumstances, there is nothing in the rationale of *Toolson* which requires displacement of state law.

Second, respondents argue that the New York Supreme Court in *American League Baseball Club v. Pasquel*,[6] in effect overruled the earlier *Chase* decision[7] and declared that the New York antitrust laws do not apply to baseball. (Opp. 25-26). It did not. Moreover, the significance of the New York cases is not that they found violations of state antitrust law, but that they recognized that state law could constitutionally be applied. In this respect, *Pasquel* confirms *Chase*.[8] In *Pasquel* the New York Yankees sought to enjoin the Mexican League from inducing Yankee players to breach their employment contracts. Defendants resisted on the ground that the players' contracts, including the reserve clause, were illegal. The court recognized (188 Misc., at 103, 66 N. Y. S. 2d, at 744), that the New York common law outlawing unreasonable restraints of trade could be applied to baseball. While the court at first incorrectly characterized the alternative antitrust holding of

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[6]187 Misc. 230, 63 N. Y. S. 2d 537, 188 Misc. 102, 66 N. Y. S. 2d 743 (Sup. Ct. 1946).

[7]American League Baseball Club v. Chase, 86 Misc. 441, 149 N. Y. S. 6 (Sup. Ct. 1914).

[8]Respondents argue (Opp. 25) that "Chase did not hold that baseball was subject to the New York antitrust law and did not mention that law." Chase did not rely upon any New York statutory provisions, but, equally significantly, held that organized baseball was in violation of the state common law governing monopolies and unreasonable restraints of trade.

Chase as dictum (187 Misc., at 234, 63 N. Y. S. 2d, at 540), and later intimated that the contracts themselves were not illegal, it ultimately refused to strike the defense that organized baseball was engaged in a conspiracy to restrain trade, illegal under the New York antitrust laws. (188 Misc., at 106, 66 N. Y. S. 2d, at 747-8). After *Pasquel, Blake v. Frick,*[9] relying on *Chase,* again suggested that organized baseball had violated the New York antitrust law.

Thus, the New York cases, *Chase, Pasquel,* and *Blake v. Frick* (which respondents wholly ignore) support the uniformly held view that organized baseball was and is subject to state antitrust laws.

Third, respondents point to a statement in the Celler Report (H. R. Rep. No. 2002, 82d Cong., 2d Sess. (1952), p. 7) that organized baseball is "pragmatically . . . not amenable to effective State regulation." (Opp. 6, 15, 26). But that statement does not bear on a state's constitutional power to prevent violation of its antitrust laws by organized baseball. Statements in Congressional committee reports respecting unenacted legislation are not authoritative expressions of national policy. Even if they were, the fact that federal antitrust law might be more "effective" than state law does not mean that federal nonregulation deprives a state of power to deal, perhaps less effectively, with violations of state antitrust law. Nor is this what the Celler Report meant. To the contrary, it recognized the authority of the *Chase* decision and, there-

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[9] 20 Misc. 2d 520, 191 N. Y. S. 2d 177 (Sup. Ct. 1959), appeal dismissed, 9 App. Div. 2d 893, 199 N. Y. S. 2d 396 (1959).

fore, of state antitrust jurisdiction over organized baseball. (Pet. 28).[10]

3. *No Potential Conflict.* Respondents defend the holding below that the Commerce Clause bars Wisconsin's action and that uniform national regulation is required because of potential conflict in state regulation. (Opp. 20-21). They attempt to resolve the conflict between the decision below and the decisions of this Court cited in the Petition (p. 36) on the ground that those cases did not "involve a possibility of conflict threatening a subject matter requiring uniform national regulation."[11] (Opp. 20). Respondents are correct; those cases did not hold that uniform national regulation was required. But, correspondingly, they plainly held that potential conflict did not create a requirement of uniform national regulation or oust state

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[10]Respondents (Opp. 26) state that the Celler Report treated "Chase only in its discussion of contract enforcement which it distinguished from the antitrust question . . . ." If respondents mean to imply that the Celler Report did not discuss the antitrust holding of Chase, they are plainly wrong. The Report (p. 130) stated:

> "Another ground sometimes urged to deny specific enforcement of baseball contracts containing the reserve clause is that they are void and unenforceable . . . because they are unreasonable restraints of trade at common law . . . . Only one court has faced this issue . . . . In the Chase case, supra, the court stated that . . .
>
> > " 'Organized baseball' * * * is in contravention of the common law in that it invades the right of labor as a property right; and in that it is a combination to restrain and control the exercise of a profession or calling."

It is notable that the recent football merger act provides that the merger is exempt from federal antitrust laws only if it "increases rather than decreases the number of professional football clubs . . . ." 80 Stat. 1508, § 6 (1966).

[11]On respondents' theory, of course, uniform national regulation means uniform national non-regulation. Respondents are not even truly self-regulating with respect to franchise shifts or expansion. See Pet. fn. 36.

jurisdiction.[12] Furthermore, if the businesses involved in those cases—interstate radio broadcasting, air lines, shipping, and natural gas transportation[13]—have no constitutional right to "uniform national regulation" in the absence of actual conflict, surely baseball has none.

In any event, contrary to respondents' suggestion (Opp. 21), there is no evidence that potential conflict is likely. In particular, respondents have failed to show that the major leagues cannot expand to serve the few additional cities which could feasibly support major league teams. (See Pet. 35.) But even if more cities applied for franchises than could feasibly be incorporated into the National and American Leagues, the answer is not to restrict the number of

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[12]Respondents (Opp. 21) rely upon **Southern Pacific Co. v. Arizona**, 325 U. S. 761 (1945); **Edwards v. California**, 314 U. S. 160 (1941); **South Covington R. Co. v. Covington**, 235 U. S. 537 (1915); and **Hall v. DeCuir**, 95 U. S. 485 (1877), for the proposition that potential conflict is relevant. Neither **Southern Pacific** (see infra) nor **Edwards** (striking down a California statute barring the transportation of indigents into the state) considered or relied on potential conflict. In **South Covington**, as in **Southern Pacific**, a requirement relating to train lengths was involved but, unlike **Southern Pacific**, actual conflict was the issue—one state required the railroad to run more cars than was permitted by the other state in which it operated. Language in the earlier case of **Hall v. DeCuir** (striking down a state anti-discrimination statute) relying upon the possibility of conflict is now evidently disapproved by this Court's recent decisions. See Pet. 36.

[13]**Head v. New Mexico Board of Examiners**, 374 U. S. 424 (1963) (radio); **Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.**, 372 U. S. 714 (1963) (airlines); **Huron Portland Cement Co. v. City of Detroit**, 362 U. S. 440 (1960) (shipping); **Panhandle Eastern Pipe Line Co. v. Public Service Commission**, 332 U. S. 507 (1947) (natural gas transportation).

Examination of the **Huron** and **Head** opinions will show, contrary to respondents' assertion (Opp. fn. 24), that while federal statutes were discussed in connection with the question of pre-emption, the Court did not rely upon them in sustaining the state regulation under the Commerce Clause.

franchises, but to increase the number of major leagues. Thus, conflict among the states—which might occur if there were more potential applicants than potential franchises—is virtually impossible.

4. *Southern Pacific Co. v. Arizona Is Not Relevant.* Although the holding of the court below rests upon potential conflict, respondents attempt to support it on other grounds, arguing that this case is governed by *Southern Pacific Co. v. Arizona*, 325 U. S. 761 (1945). But that case, like *Bibb v. Navajo Freight Lines*, 359 U. S. 520, 529 (1959), was "one of those cases—few in number—where local safety measures that [were] . . . nondiscriminatory place[d] an unconstitutional burden on interstate commerce." And, unlike such cases as *Bibb*, *Southern Pacific* was one of the truly exceptional cases in which such state regulation was found to burden interstate commerce even though there was no conflict in state laws.[14] The conclusion of invalidity

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[14]The other cases relied upon by respondents (Opp. fns. 14 and 15) have no conceivable relevance here. **Morgan v. Virginia**, 328 U. S. 373 (1946), like **Bibb**, was a case in which there was an actual conflict in state segregation regulations respecting interstate carriers. **Graves v. New York ex rel. O'Keefe**, 306 U. S. 466 (1939), did not even involve the Commerce Clause, and held that the salaries of federal officials were not constitutionally immune from non-discriminatory state taxation. **The Minnesota Rate Cases**, 230 U. S. 352 (1913), determined that states could regulate intrastate railroad rates. **Welton v. Missouri**, 91 U. S. 275 (1875), invalidated a discriminatory license tax upon peddlers of out-of-state goods. **Leisy v. Hardin**, 135 U. S. 100 (1890), struck down a state law prohibiting the sale of intoxicating beverages in reliance upon the now discredited original package doctrine.

In **Missouri ex rel. Barrett v. Kansas Natural Gas Co.**, 265 U. S. 298 (1924), the Court held that while a state can regulate the rates of distributing companies in selling to local consumers, states cannot regulate the rates of the earlier sale from the natural gas pipeline company to the distributor. **Edwards v. California** (a discrimination case) and **Hall v. DeCuir** are discussed in footnote 12, **supra.**

rested upon the presence of a strong federal concern, the absence of legitimate state interest, and a showing of actual and severe disruption of the free flow of commerce. None of those factors is present here.

First (Pet. 24), *Southern Pacific* rested in large part upon the "National Transportation Policy" of the Interstate Commerce Act (54 Stat. 899 (1940)) which expressed a vital national interest in an efficient national rail transportation system. Here, there is no such act of Congress. And organized baseball, unlike interstate carriers, is not a "field of paramount federal concern." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U. S. 132, 142 (1963). As we have shown, the Congressional policy, if any, has been to adopt the holding that baseball is a "state affair."

Second, in *Southern Pacific*, the Supreme Court found (325 U. S., at 775-79) that the advantage of the Arizona train limit law as a safety measure was dubious. On the other hand, both this Court and federal agencies charged with enforcing the federal antitrust laws have recognized that state antitrust enforcement is of great value in supplementing federal antitrust policy and in removing barriers to the free flow of interstate commerce. (See Pet. 17-20, 33).

Third, in *Southern Pacific* the railroad made an extensive factual showing, embodied in findings of the state trial court, as to the expense and delay which the Arizona law occasioned. (325 U. S., at 771-75). Such a showing is indispensable to establish that state legislation burdens interstate commerce. Respondents' Opposition fails to state how expansion would in any way impede their interstate business operations. Respondents do object that expansion would require them "to travel regularly to Milwaukee" and

would result in the transfer of some existing player contracts, "thereby depriving the interstate commerce operating in the present eight National League states of those property rights. . . ." (Opp. 19).[15] But this simply does not show a burden on commerce. Respondents' claim of burden is no more substantial than would have been a claim that the Arizona train limit law in *Southern Pacific* required the railroad to run shorter trains than it wanted to. Such a claim, without more, would hardly have called the constitutionality of the Arizona law into question.[16]

5. *No Discrimination.* Although the court below did not find that application of Wisconsin's antitrust law would discriminate against interstate commerce, respondents attempt to support the result on that ground. However, the Wisconsin antitrust law is applied with an even hand to both interstate and intrastate businesses. The fact that this particular case involves an interstate business hardly shows discrimination. Respondents rely on cases holding that a state cannot protect its natural resources for its own citizens at the expense of other states or protect local businesses from out-of-state competition. (Opp. 17-18). However, those cases are plainly inapplicable. The award of a franchise to one of the Milwaukee applicants would not prevent respondents from playing baseball in other states;

---

[15]Of course, respondents would be compensated for the contracts transferred. Although respondents erroneously claim that operation of an eleven-team league is not feasible (see Pet. 8), they do not dispute that it is feasible to operate a twelve-team league. (See Opp. 19).

[16]Furthermore, organized baseball itself expanded in 1960 and 1961, and transferred player contracts to the new franchises. Respondents have for 13 years regularly traveled to Milwaukee to play baseball there. Obviously, further expansion to continue baseball in Milwaukee would not burden interstate commerce.

Wisconsin's antitrust law protects, rather than impairs, competition.

6. *This Case Is Important.* This case presents significant constitutional questions concerning the power of states to enforce their antitrust laws. Respondents have failed to show that these questions are unimportant or that they were correctly decided by the Wisconsin Supreme Court.

Accordingly, the Petition for Certiorari should be granted.

Respectfully submitted,

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SEASON ATTENDANCE (with FINAL LEAGUE STANDING)

National League

YEAR	BRAVES	CUBS	REDS	CARDINALS	DODGERS	PHILLIES	PIRATES	GIANTS
1953	1,826,397 (2)	763,658 (7)	548,086 (6)	880,242 (4)	1,163,419 (1)	853,644 (3)	572,757 (8)	811,518 (5)
1954	2,131,188 (3)	748,183 (7)	704,167 (5)	1,039,698 (6)	1,020,531 (2)	738,991 (4)	475,494 (8)	1,155,067 (1)
1955	2,005,836 (2)	875,800 (6)	693,662 (5)	849,130 (7)	1,033,589 (1)	922,886 (4)	469,397 (8)	824,112 (3)
1956	2,046,331 (2)	720,118 (8)	1,125,928 (3)	1,029,773 (4)	1,213,562 (1)	934,798 (5)	949,878 (7)	629,179 (6)
1957	2,215,404 (1)	670,629 (8)	1,070,850 (4)	1,183,575 (2)	1,028,258 (3)	1,146,230 (5)	850,732 (7)	653,923 (6)
1958	1,971,101 (1)	979,904 (5)	788,582 (4)	1,063,730 (6)	1,845,556 (7)	931,110 (8)	1,311,988 (2)	1,272,625 (3)
1959	1,749,712 (2)	858,255 (5)	801,298 (6)	929,953 (7)	2,071,045 (1)	802,815 (8)	1,359,917 (4)	1,422,130 (3)
1960	1,497,799 (2)	809,770 (7)	663,486 (6)	1,096,632 (3)	2,253,887 (4)	862,205 (8)	1,705,828 (1)	1,795,356 (5)
1961	1,101,441 (4)	673,057 (7)	1,123,240 (1)	855,615 (5)	1,813,465 (2)	584,039 (8)	1,199,128 (6)	1,391,221 (3)
1962	766,921 (5)	609,802 (9)	982,095 (3)	953,895 (6)	2,755,184 (2)	762,034 (7)	1,090,648 (4)	1,592,594 (1)
1963	773,018 (6)	979,551 (7)	858,805 (5)	1,170,546 (2)	2,538,602 (1)	907,141 (4)	783,648 (8)	1,571,306 (3)
1964	910,911 (5)	751,647 (8)	862,466 (2)	1,143,294 (1)	2,228,754 (6)	1,425,891 (2)	759,496 (6)	1,504,364 (4)
1965	555,584 (5)	641,361 (8)	1,047,824 (4)	1,241,195 (7)	2,553,577 (1)	1,166,376 (6)	909,279 (3)	1,546,075 (2)
Annual Average	1,503,973	775,518	866,961	1,033,637	1,809,187	926,012	956,784	1,243,805

American League

YEAR	ORIOLES	RED SOX	WHITE SOX	INDIANS	TIGERS	ATHLETICS	YANKEES	SENATORS
1953	297,238 (8)	1,026,133 (4)	1,191,353 (3)	1,069,176 (2)	884,658 (6)	362,113 (7)	1,537,811 (1)	595,594 (5)
1954	1,060,910 (7)	931,127 (4)	1,231,629 (3)	1,335,472 (1)	1,079,847 (5)	304,666 (8)	1,475,171 (2)	503,542 (6)
1955	852,039 (7)	1,203,200 (4)	1,175,684 (3)	1,221,780 (2)	1,181,838 (5)	1,393,054 (6)	1,490,138 (1)	425,238 (8)
1956	901,201 (6)	1,137,158 (4)	1,000,090 (3)	865,467 (2)	1,051,182 (5)	1,015,154 (8)	1,491,784 (1)	431,647 (7)
1957	1,029,581 (5)	1,181,087 (3)	1,135,668 (2)	722,256 (6)	1,272,346 (4)	901,067 (7)	1,497,134 (1)	457,079 (8)
1958	829,991 (6)	1,077,047 (3)	797,451 (2)	663,805 (4)	1,098,924 (5)	925,090 (7)	1,428,438 (1)	457,288 (8)
1959	891,926 (6)	984,102 (5)	1,423,144 (1)	1,497,976 (2)	1,221,221 (4)	963,683 (7)	1,552,030 (3)	615,372 (8)
1960	1,187,849 (2)	1,129,866 (7)	1,644,460 (3)	950,985 (4)	1,167,669 (6)	774,944 (8)	1,627,349 (1)	743,404 (5)
1961	950,818 (3)	850,919 (6)	1,151,999 (4)	735,547 (5)	1,606,500 (2)	683,549 (9)	1,748,836 (1)	597,497 (8)
1962	790,254 (7)	733,080 (8)	1,131,562 (5)	716,076 (6)	1,207,881 (4)	635,675 (9)	1,493,574 (1)	729,775 (10)
1963	774,343 (4)	942,642 (7)	1,158,848 (2)	562,507 (5)	821,952 (6)	762,364 (8)	1,308,920 (1)	535,604 (10)
1964	1,116,215 (3)	883,276 (8)	1,250,053 (2)	653,293 (6)	816,141 (4)	642,478 (10)	1,305,638 (1)	600,106 (9)
1965	781,649 (3)	652,201 (9)	1,130,519 (2)	934,786 (5)	1,029,640 (4)	528,264 (10)	1,213,552 (6)	560,083 (8)
Annual Average	881,847	979,372	1,186,343	917,633	1,110,754	760,931	1,474,652	559,248

GIANTS	ASTROS - (formerly Colt .45s)	METS
811,518 (5)		
1,155,067 (1)		
824,112 (3)		
629,179 (6)		
653,923 (6)		
1,272,625 (3)		
1,422,130 (3)		
1,795,356 (5)		
1,391,221 (3)		
1,592,594 (1)	924,456 (10)	922,530 (8)
1,571,306 (3)	719,502 (10)	1,080,108 (9)
1,504,364 (4)	725,773 (10)	1,732,597 (9)
1,546,075 (2)	2,151,473 (10)	1,768,389 (9)
1,243,805	1,130,301	1,375,906

SENATORS	TWINS	ANGELS
595,594 (5)		
503,542 (6)		
425,238 (8)		
431,647 (7)		
457,079 (8)		
457,288 (8)		
615,372 (8)		
743,404 (5)		
597,497 (8)	1,259,160 (7)	597,348 (8)
729,775 (10)	1,433,116 (2)	1,144,063 (3)
535,604 (10)	1,406,652 (3)	821,015 (9)
600,106 (9)	1,207,514 (6)	760,439 (4)
560,083 (8)	1,463,268 (1)	566,727 (7)
559,248	1,353,942	777,918

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1966.

NO. 659

STATE OF WISCONSIN,

Petitioner,

vs.

MILWAUKEE BRAVES, INC., *et al.*,

Respondents.

BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

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Printed by Authority of the State of Illinois 365

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The State of Illinois, by William G. Clark, Attorney General of Illinois, respectfully submits its brief in support of the Petition for a Writ of Certiorari as *amicus curiae.*

INTEREST OF THE STATE OF ILLINOIS AS AMICUS CURIAE.

In 1965, Illinois adopted a new anti-trust act modeled in many respects after the existing federal laws. Prior to

this time the state laws regulating business were antiquated and an effective state anti-trust policy was not attainable. Since the enactment of the new legislation, Illinois has attempted to vigorously assert its new act against local violations of well recognized anti-trust policies. At the threshold, however, Illinois is confronted with the recent decision of the Wisconsin Supreme Court here in issue, which if allowed to stand unmodified may seriously impede its attempt to enforce a state anti-trust policy which will complement federal anti-trust policy* and extend it to otherwise unreachable areas.

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* The Illinois Statute expressly provides that federal anti-trust decisions where applicable are to be deemed controlling precedents for its interpretation. Ill. Rev. Stat. 1965, ch. 38, § 60-11.

ARGUMENT.

The decision of the Wisconsin Supreme Court is predicated on a finding that the withdrawal of the Milwaukee Braves, Inc. from Milwaukee, Wisconsin, to Atlanta, Georgia involved a violation of the anti-trust laws of Wisconsin. The court, however, held that the state anti-trust laws could not be applied on two alternative grounds:

1) The decisions of this Court which have not been altered by Congressional action establish a national policy binding upon the States that the business of baseball is to be exempt from anti-trust regulation.

2) Baseball is an area of interstate commerce that demands uniform regulation to the degree that state regulation is prohibited by the Commerce Clause.

Both these alternative bases for the decision present a significant impediment to state anti-trust enforcement.

With respect to the first of the grounds of decision, *Federal Baseball Club* v. *National League*, 259 U. S. 200, was decided on the basis that baseball is not interstate commerce. *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356, affirmed the decision "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal anti-trust laws." 346 U. S. at 357.

It is the contention of the State of Illinois that merely because Congress does not choose to regulate a particular business or industry that industry is not to be deemed exempt from state regulation.

Of course it is within the power of Congress to exclude from state regulation any business or industry in interstate commerce, and we interpret the *Toolson* case as impliedly holding that baseball is in interstate commerce.* Furthermore this intent of Congress may be exhibited by its decision to leave the area unregulated. However, we know of no case in which Congressional inaction has been held to preempt an area without strong evidence of that intent. It is respectfully submitted that to allow Congressional inaction to preempt state regulation of a business or industry with no evidence to support it other than Congressional failure to act after this Court has held the business not covered by federal regulation would be a dangerous precedent and a challenge to a state's enforcement of its anti-trust laws with respect to any business or industry not held to be subject to federal regulation.

Generally where the intent of Congress to exclude an area from state regulation has been found, it has been based on the passage of a federal statute which covered the general area but left the specific area unregulated. (See *Bethlehem Co.* v. *State Board,* 330 U. S. 767.)

Congress was recently given the opportunity in S. 950 to exempt professional sports from the ambit of the federal anti-trust laws. Its failure to pass this broad bill is indeed strong evidence of its intent that these areas be governed by some anti-trust regulations.

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* If *Toolson* is not to be so interpreted, the decision of the Wisconsin Supreme Court is completely untenable; a business may not be regulated by a state because it is not regulated by federal law because it is not in interstate commerce.

This Court well described the general rules in this area in *Cloverleaf Co.* v. *Patterson,* 315 U. S. 148, where the Court said at pages 155-156:

> "It has long been recognized that, in those fields of commerce where national uniformity is not essential, either the state or federal government may act. *Willson* v. *Black-bird Creek Marsh Co.,* 2 Pet. 245; *California* v. *Thompson,* 313 U. S. 109, 114. Where this power to legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the nation. But where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application.
>
> When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation."

Since these *criteria* of federal preemption have not been met in this case, the failure of Congress to legislate in light of the *Federal Baseball Club* and *Toolson* opinions is not a sufficient basis to prohibit state regulation.

The second alternative basis for the decision of the Wisconsin Supreme Court raises greater dangers for state anti-trust enforcement. The ruling that baseball is an area of interstate commerce which demands uniform regulation to the degree that state regulation is prohibited expands the nature of an exclusion on this basis far beyond the limits imposed by this Court.

Illinois does not contend that the nature of an industry in interstate commerce may not in a proper case preclude state regulation. Indeed where divergent state regulations may make operation of an industry on an interstate basis unfeasible, it is necessary to preclude state action.

The application of this principle to the enforcement of state anti-trust laws which are similar to the operation and effect of the federal law on the same subject is difficult to justify. The Wisconsin Supreme Court recognized that no such reasons presently exist but apparently predicated their opinion on the possibility that different standards could be applied in the future.

Similar reasoning could be applied to restrict the application of state anti-trust laws with respect to any industry or at least any organization in interstate commerce.

It is submitted that a real and present danger of diverse regulation which would make the operation of the industry on an interstate basis impossible on a practical level must be shown before it is held that state regulation is precluded. Here no diverse regulation has been shown nor has it been shown how, if it should exist, it would render impossible the business of baseball. Thus it extends the limits upon state anti-trust regulation to a point far beyond the most restrictive decision of this Court.

In its only decision on the interrelationship of state and federal anti-trust regulation, this Court indicated there was a vast field in which these governmental bodies could operate together. (*Standard Oil Co.* v. *Tennessee*, 217 U. S. 413.) Since the instant decision substantially limits this field, we feel it should be reversed.

In final analysis, the decision of the Wisconsin Supreme Court is predicated on the basis of federal preemption of

the field. In *Florida Avocado Growers* v. *Paul*, 373 U. S. 132, this Court said at page 142:

> "The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."

In the instant case the Wisconsin Supreme Court ruled that preemptions exist both on the basis that Congress so intended and on the basis of the nature of the regulated subject matter. However, persuasive reasons do not exist which dictate that the nature of the subject matter "permits no other conclusion," or that Congress "unmistakably so ordained." Thus the decision constitutes a precedent for an unwarranted limitation of state regulatory powers especially in the anti-trust field and should not be allowed to stand.

CONCLUSION.

For the reasons stated herein, it is the position of the State of Illinois as *Amicus Curiae* that *certiorari* should be granted in the instant case, and the decision of the Wisconsin Supreme Court reversed.

Respectfully submitted,

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In The

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October Term, 1966

No. 659

STATE OF WISCONSIN,

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v.

MILWAUKEE BRAVES, INC., et al.,

Respondents.

PETITION FOR REHEARING

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In The

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v.

MILWAUKEE BRAVES, INC., et al.,

Respondents.

PETITION FOR REHEARING

The State of Wisconsin prays that this Court grant rehearing of its order of December 12, 1966 denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Supreme Court of Wisconsin in the above-entitled case as prayed for in the petition filed October 11, 1966. That petition sought review of a four to three decision by the Wisconsin Supreme Court that the Supremacy and and Commerce Clauses of the United States Constitution deprived the State of jurisdiction to redress respondents' violation of its antitrust laws. Petitioner respectfully prays that this Court grant rehearing for the following reasons:

1. The order denying certiorari raises an important question concerning the certiorari jurisdiction of this

Court. Certiorari was denied in this case with Justices Black, Douglas and Brennan noting their dissents. Mr. Justice Fortas did not participate in the consideration or decision of the matter. Petitioner suggests that denial of certiorari under such circumstances is contrary to the philosophy of this Court's certiorari jurisdiction and perhaps to the representations made to the Congress on behalf of this Court in 1924 when Congress was considering the Judiciary Act of 1925, 43 Stat. 936, which enlarged the Court's discretionary certiorari jurisdiction to its present scope.

Ordinarily the votes of four Justices are required for certiorari. But, as Mr. Justice Harlan, speaking for a majority of the Court, has stated in a case raising fundamental questions as to the power of the Court to dismiss a writ as improvidently granted: "the whole philosophy of the 'rule of four,' . . . is that any case warranting consideration in the opinon of such *a substantial minority* of the Court will be taken and disposed of." [Emphasis supplied.][1] In a case in which only eight Justices participate a "substantial minority" is necessarily less than four. Three is the largest minority which is mathematically possible. The "philosophy" of the "rule of four" therefore indicates that certiorari should be granted when three out of eight vote to hear the case. Furthermore, it seems appropriate to construe a "substantial minority" as equivalent to the maximum number of dissenting votes possible in a disposition on the merits having precedental effect. Where nine Justices participate, that number is four. Where eight Justices

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[1]**Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 560 (1957) (Mr. Justice Harlan wrote for the Chief Justice and Justices Black, Douglas, Burton, Clark, and Brennan.) See also Id., p. 528 (Justice Frankfurther dissenting): "a minority may bring a case here for oral argument . . . ."**

participate, that number is necessarily three since a disposition by a four to four vote is no precedent. See *United States v. Pink*, 315 U. S. 203, 216 (1942); *Hertz v. Woodman*, 218 U. S. 205, 213-14 (1910). Finally, it seems generally recognized that three votes are sufficient where only seven Justices participate. This may well be the practice because in a Court of seven three is the largest possible minority and the maximum number of dissenting votes possible in a disposition on the merits. All these reasons why three is deemed a "substantial minority" of seven participating Justices obtain where the number of Justices participating is eight.

This construction of the Court's certiorari jurisdiction is corroborated by the legislative history of the Judiciary Act of 1925. The bill, known as the Judges Bill, was drafted by a committee of this Court and approved by all its members. See S. Rep. No. 362, 68th Cong., 1st Sess. (1924), p. 1; H. R. Rep. No. 1075, 68th Cong., 2d Sess. (1925), p. 2. The heart of the legislative history of that Act as it relates to certiorari jurisdiction is the testimony of Justice Van Devanter who represented the Court before the Senate and House Committees. At that time Justice Van Devanter, on behalf of the Court, advised that certiorari was granted "whenever the vote is relatively close," and that the writ was granted upon a vote of three Justices where appropriate. Petitioner respectfully suggests that this explanation of the Court's certiorari practice should be followed here. See *Rogers supra*, at 560-61.

The brief Senate Report (S. Rep. No. 362, 68th Cong., 1st Sess. (1924), p. 2) referred the Senate to the testimony of Justice Van Devanter given before the Senate

Judiciary Committee for explanation of the bill. At those hearings Justice Van Devanter made the Court's practice clear:

> "Mr. Justice Van Devanter:...The Supreme Court . . . examines the matter in the petition, record, and briefs, each member of the court making his own examination. In our conference a vote is taken on the question whether the petition shall be granted or refused . . . [W]*henever the vote is relatively close the conference makes it a practice to grant the petition.*
>
> "Mr. Justice Sutherland: Even though a majority be against it?
>
> "Mr. Justice Van Devanter: Yes. For instance, if there were five votes against granting the petition and four in favor of granting it, it would be granted, because we proceed upon the theory that when as many as four members of the court, *and even three* in some instances, are impressed with the propriety of our taking the case, petition should be granted. This is the uniform way in which the petitions for writs of certiorari are considered." [Emphasis supplied.][2]

The House Report confirms that Justice Van Devanter's description of the Court's "substantial minority" practice in granting certiorari was a significant factor in causing the Congress to extend the Court's discretionary certiorari jurisdiction. The Report (H. R. Rep. No. 1075, 68th Cong., 2nd Sess. (1925), p. 3) states:

> "Lest it should be thought that the increase of discretionary jurisdiction might impair the administration of justice . . . it is proper to call attention to

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[2]Hearings Before a Subcommittee of the Senate Committee on the Judiciary, 68th Cong., 1st Sess., on S. 2060 and S. 2061 (1924), p. 29, H. R. 8206 and S. 2060 as introduced were versions of the same bill. S. 2060 was eventually enacted bearing the number of the House bill.

the very thorough and complete system by which discretionary jurisdiction is exercised. . . . The luminous and informing statement of Mr. Justice Van Devanter tells the whole story:

* * *

> '[All nine Justices consider each petition for certiorari]. We do not grant or deny these petitions merely according to a majority vote. We always grant the petition when as many as four think that it should be granted and sometimes when *as many as three* think that way. *We proceed upon the theory that, if that number out of the nine are impressed with thought that the case is one that ought to be heard and decided by us, the petition should be granted.'* " [Emphasis supplied.][3]

Particularly significant in this constitutional case is the fact that the House Report emphasized that extension of the discretionary certiorari jurisdiction of the Court was designed to make it possible for the Court to give full attention to federal constitutional questions. It stated (p. 2): "the court is hindered from hearing and determining more important cases [because of the number of trivial cases brought before it] and from efficiently functioning in the performance of its highest duty of interpreting the Constitution. . . ." Therefore, in a case such as the present

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[3]The quotation is from Justice Van Devanter's testimony at the House Committee Hearings. Hearings Before the House of Representatives Judiciary Committee, 68th Cong., 2nd Sess., on H. R. 8206 (1924), p. 8. At those hearings (ibid.) Justice Van Devanter also testified that "while the authority of the Supreme Court to take cases on petition for certiorari is spoken of as a discretionary jurisdiction, this does not mean that the court is authorized merely to exercise a will in the matter but rather that the petition is to be granted or denied according to a sound judicial discretion." Justice Van Devanter then went on to explain that petitions for certiorari were considered by the whole Court and that, as quoted above, the Court followed a "substantial minority" practice.

one raising important constitutional issues, it is particularly important for the Court to grant certiorari upon the vote of a "substantial minority" and thus to perform "its highest duty" for which its present certiorari jurisdiction was designed.

In light of the *Rogers* case and the legislative history of the 1925 Act petitioner respectfully suggests that the votes of three Justices in a Court of eight constitute a "substantial minority" and reveal a "relatively close" vote should result in an order granting certiorari—particularly upon the petition of a State raising important, unresolved, federal constitutional questions.[4]

Moreover, whether or not the Court agrees that the vote of three Justices should be sufficient where only eight participate, petitioner suggests that this is one of those cases in which " 'a doubting Justice' " should "respect 'the judgment of his brethren that the case does concern issues important enough for the Court's consideration and adjudication' . . ." *Rogers, supra,* at 561.

2. The circumstances of this case make it particularly appropriate for the Court to grant certiorari upon the recorded vote of three Justices.

(a) The result of a denial of certiorari in this case is that the baseball monopoly has now succeeded in establish-

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[4]Although there have been a few isolated instances in which this Court has denied certiorari by a recorded vote of five to three, in none of those cases so far as we know was it argued that certiorari should have been granted because three votes were sufficient. In Casselman v. Idaho, 338 U. S. 900 (1949) certiorari was denied by a five to three vote. The petition for rehearing, filed by Mr., later Justice, Arthur Goldberg, suggested that three votes might have been sufficient for certiorari but argued only that consideration of the case should be deferred until all nine Justices were available. Rehearing was denied, 338 U. S. 952 (1950).

ing an unprecedented and dangerous immunity from antitrust jurisdiction not enjoyed by any other American business. Its monopoly practices were first considered too local for this Court to hold that Congress intended to proscribe them in the Sherman Act. They are now held to be too interstate for constitutional regulation under state antitrust law. It is the ultimate irony here that the Commerce Clause which was intended to facilitate the free flow of goods and services has been invoked to protect a restrictive refusal to deal by an absolute private monopoly.

Even at common law abuses by monopolies were actionable. Historically, whenever monopoly power has been suffered to exist, it has been regulated either by the legislature, or, absent such regulation, by the courts. Since 1602 when the Court of King's Bench resolved that a royal grant of a monopoly for the manufacture of playing cards was void as "against the common law" and "divers Acts of Parliament," (*The Case of Monopolies*, 11 Coke 84, 77 Eng. Rep. 1260 (1602)), English and American courts have steadfastly refused to suffer private monopoly to commit abuses completely free from all sanction. This Court, in *Munn v. Illinois*, 94 U. S. 113, 134 (1876), pointed out, drawing upon the common law precedents:

> "[I]n matters [involving a private monopoly] which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable." *Id.*, at 134.

As Chief Justice Waite said for this Court, *id.*, at 125-26, a monopoly over property or a service "in which the pub-

lic has an interest . . . must submit to be controlled by the public for the public good."

The present case illustrates why monopolies should not go unregulated. Here, a monopoly has determined to boycott the entire State of Wisconsin. This Court's denial of certiorari has the effect of placing this abuse of monopoly power beyond the jurisdiction of any authority under existing law. The dangers to the public from this license are illustrated by the statements of Mr. Walter O'Malley, principal owner of the respondent Los Angeles Dodgers, appearing in the record in this case[5] and in the press after this Court's December 12, 1966 order was announced.[6] Those statements indicate that the baseball monopoly may well continue to boycott Wisconsin because public officials in Wisconsin dare express themselves critically about organized baseball and initiate litigation under laws which it is their sworn duty to enforce. This Court should not permit the federal Constitution to shield such abuse of monopoly power.

(b) The thriving condition of those professional league sports which are now subject to the antitrust laws is dramatic proof that respondents do not require a constitutional license to violate state antitrust law in order to survive and flourish.

Where application of traditional anti-trust principles to powerful, nationwide industries, such as organized sports, insurance and banking has proved too restrictive, Congress has shown itself quite willing to take action. E. g., compare: *United States v. South-Eastern Underwrit-*

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[5]R., 6201, 6302.
[6]Milwaukee Sentinel, Tuesday, December 13, 1966: Section 2, p. 1.

ers Association, 322 U. S. 533 (1944) with the McCarran Act, 15 U. S. C. §§ 1011-1015; *United States v. National Football League*, 116 F. Supp. 319 (EDPA 1953) with 15 U. S. C. sec. 1291 (Television Pooling); *United States v. DuPont & Co.*, 366 U. S. 316 (1961) with Int. Rev. Code of 1954, § 301 (f), as amended, 76 Stat. 4 (Feb. 3, 1962); *United States v. Philadelphia National Bank*, 374 U. S. 321 (1963) with the 1966 Amendment to the Bank Merger Act, 80 Stat. 7 (1966). See also the Football Merger Act, 80 Stat. 1508 (1966). If this Court sustained the application of state antitrust laws to organized baseball and they proved to be unduly burdensome, organized baseball would have resort to a receptive Congress.

But if this Court denies state antitrust jurisdiction over organized baseball, there will be no remedy for its abuses.

In light of congressional failure after *Toolson* to subject this powerful monopoly to federal anti-trust laws, one can hardly expect legislation to permit correction of the decision below and allow the states to deal with essentially local abuses such as those suffered by Wisconsin.

Only if state antitrust jurisdiction over baseball is upheld is Congress likely to respond to this Court's invitation in *Radovich v. National Football League*, 352 U. S. 445 (1957) and deal affirmatively with the inequities and other federal antitrust problems which are left by this Court's *Toolson* decision.

3. The State of Wisconsin in the petition, and the State of Illinois in its brief amicus curiae, have pointed out the decision below would confuse and hamper enforcement of the state antitrust laws, particularly with respect to or-

ganized league sports. The State of Wisconsin is now confronted by citizen complaints about organized professional football, and is in serious doubt as to whether the decision below will permit enforcement of the State's antitrust laws against that sport and whether, in all fairness, it should subject professional football to sanctions if professional baseball has been correctly held to be constitutionally immune.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Supreme Court of Wisconsin to permit full consideration of the important constitutional issues involved.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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